No. 15-5991

Title:	Lawrence Eugene Shaw, Petitioner v. United States
Docketed:	September 9, 2015
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(13-50136)
Decision Date:	March 27, 2015
Rehearing Denied:	June 8, 2015

Questions Presented

---Date---	-------Proceedings and Orders----------
Sep 4 2015	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 9, 2015)
Sep 30 2015	Order extending time to file response to petition to and including November 9, 2015.
Nov 6 2015	Order further extending time to file response to petition to and including December 9, 2015.
Dec 4 2015	Order further extending time to file response to petition to and including January 27, 2016.
Jan 28 2016	Order further extending time to file response to petition to and including March 10, 2016.
Mar 8 2016	Brief of respondent United States in opposition filed.
Mar 22 2016	Reply of petitioner Lawrence Eugene Shaw filed. (Distributed)
Mar 24 2016	DISTRIBUTED for Conference of April 15, 2016.
Apr 18 2016	DISTRIBUTED for Conference of April 22, 2016.
Apr 25 2016	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
May 13 2016	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 27, 2016.
May 13 2016	The time to file respondent's brief on the merits is extended to and including August 15, 2016.
Jun 27 2016	Joint appendix filed. (Statement of costs filed)
Jun 27 2016	Brief of petitioner Lawrence Eugene Shaw filed.
Jul 5 2016	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jul 13 2016	SET FOR ARGUMENT on Tuesday, October 4, 2016.
Jul 22 2016	Record requested from U.S.C.A. 9th Circuit.
Jul 23 2016	The record received from U.S.C.A. 9th Circuit is electronic and located on PACER, with the exception of a SEALED document that is electronic.
Jul 23 2016	Record received from U.S.D.C. Central Dist. of California (Western Div. - Los Angeles) is electronic and located on PACER, with the exception of a SEALED document that is electronic.
Aug 15 2016	Brief of respondent United States filed.
Aug 19 2016	CIRCULATED.
Sep 14 2016	Reply of petitioner Lawrence Eugene Shaw filed. (Distributed)

Oct 4 2016	Argued. For petitioner: Koren L. Bell, Deputy Federal Public Defender, Los Angeles, Cal. For respondent: Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Dec 12 2016	Judgment VACATED and case REMANDED. Breyer, J., delivered the opinion for a unanimous Court.
Jan 13 2017	JUDGMENT ISSUED.

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15-5991

IN THE

Supreme Court of the United States

LAWRENCE EUGENE SHAW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
SEP 24 2015
OFFICE OF THE CLERK

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Petitioner, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel in the Ninth Circuit under the Criminal Justice Act, 18 U.S.C. § 3006A(b).

This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

HILARY L. POTASHNER
Federal Public Defender
Central District of California

DATED: September 4, 2015

KOREN L. BELL
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15-5991

IN THE

Supreme Court of the United States

LAWRENCE EUGENE SHAW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case is an excellent vehicle to resolve the question left open in Loughrin v. United States, 134 S.Ct. 2384 (2014), about which all of the circuits have now weighed in and remain openly, and increasingly, divided: Whether, for purposes of subsection (1) of the bank-fraud statute, 18 U.S.C. §1344, a "scheme to defraud a financial institution" requires proof of a specific intent not only to deceive, but also to cheat, a bank, as the majority of circuits -- nine of twelve -- have held and as petitioner Lawrence Shaw argued before the Ninth Circuit Court of Appeals, which instead joined the minority view in affirming his convictions for a scheme directed at a non-bank third-party

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IN THE SUPREME COURT OF THE UNITED STATES

No._____

LAWRENCE EUGENE SHAW,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Lawrence Eugene Shaw, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is published at United States v. Shaw, 781 F.3d 1130 (9th Cir. 2015). (Pet. App. A) The district court did not issue any relevant written decisions.

JURISDICTION

The Ninth Circuit entered its judgment on March 27, 2015. On June 8, 2015, the court denied Shaw's timely petition for rehearing en banc. (Pet. App. B). This petition is filed within 90 days after that date pursuant to Sup. Ct. R. 13. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

18 U.S.C. §1344 provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice--
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

Last year, this Court held that subsection (2) of the bank-fraud statute, 18 U.S.C. §1344, does not require proof of a "scheme to defraud a financial institution," and thus proof that the defendant intended to defraud a bank. See Loughrin, 134 S.Ct. at 2387 By contrast, Loughrin held, subsection (1) does. Id. at 2389-90. But Loughrin did not address what such proof entails -- e.g. whether subsection (1)'s "scheme to defraud a financial institution" requires proof of an intent not only to deceive, but also to cheat, a bank, as nine circuits -- the First, Second, Third, Fourth, Fifth, Seventh, Tenth, Eleventh and D.C. Circuits -- agree, and as petitioner Shaw argued here.

This case presents that question -- a recurring question about which all of the circuits have now weighed in and remain openly, and now increasingly, divided in the wake of Loughrin. Shaw's scheme was designed to steal bank-customer Stanley Hsu's money from his Bank of America account. The Ninth Circuit affirmed his convictions under subsection (1) of the statute even though the government never argued during trial, or at any point on appeal, that there was evidence of Shaw's intent to cheat the bank, as opposed to just bank-customer Hsu, and neither the trial court, nor the court of appeals, questioned the fact that Shaw intended only to cheat bank-customer Hsu, not the banks. In so holding, the Ninth Circuit joined the minority view, construing §1344(1) to require proof of an intent to deceive -- but not to cheat -- a bank, in accordance with the Sixth and Eighth Circuits.

The divide over the requisite mens rea -- now nine-to-three -- is clear, entrenched, and unaffected by Loughrin. Given the Ninth Circuit's minority-view construction of subsection (1), it rejected Shaw's sole claims that his convictions should be reversed and entry of judgment of acquittal entered given the lack of sufficient proof of his intent to cheat a bank, or in the alternative, his case remanded for a new trial because the jury instructions allowed conviction without such proof.

1. Shaw devised a scheme to take money from the Bank of America savings account of Stanley Hsu. Hsu was a wealthy foreign businessman who employed Shaw's girlfriend's mother overseas, and arranged for his bank statements to be sent to the home Shaw shared with the girlfriend. (ER 323-326; 344; 583-585).[1] Shaw thus got ahold of the account information contained in Hsu's bank statements, created a Paypal account in Hsu's name, linked this Paypal account to Hsu's Bank of America account, and effected multiple outgoing transfers from Hsu's Bank of America account to the Hsu Paypal account between June and October 2007, thereby taking a total of over $300,000 from Hsu. (ER 377-379; 381; 386-388). Hsu did not review his statements on a regular basis, and did not thus discover his loss until October 2007 (ER 337).

---

[1] "ER" followed by a number refers to the applicable page in the Appellant's Excerpts of Record filed in the Ninth Circuit Court of Appeals. "CR" refers to the District Court Clerk's record and is followed by the applicable docket control number.

Once Shaw effected these outgoing transfers of Hsu's money, he then moved it in and out of two Washington Mutual accounts he opened in the name of his father to cover his tracks, ultimately writing himself checks which he deposited into a joint account held with his girlfriend. (ER 398-407; 437-38).

For this conduct, Shaw was charged with 17 counts[2] of bank fraud under subsection (1) of 18 U.S.C. §1344, which applies only to schemes to "defraud a financial institution," rather than subsection (2), which is broader and covers deceptive schemes to "obtain. moneys. . under the custody or control of" the bank. See 18 U.S.C. §1344. (CR 11, ER 32).

2. The evidence at trial established that Shaw intended to deceive the banks in order to take bank-account-holder Hsu's money and cover his tracks, but not that he intended to expose the banks to actual or potential loss. There was no direct evidence that Shaw intended to bilk the banks, as opposed to Hsu. Nor was there circumstantial evidence to support such an inference, given Shaw's singular focus on taking Hsu's money, his use of non-bank-entity Paypal to effectuate the scheme, and the fact that Hsu and Paypal, not the banks, bore the actual and potential loss.

Indeed, the evidence at trial was that Paypal sent $131,000 of the $300,000-plus that was taken back to Hsu through 16 auto-reversals of the transfers that Shaw had effected in the 60-day period prior to Hsu's discovery of the scheme. (ER 387-389). As a result, Paypal sustained a net $106,000 in loss. (ER 389). Hsu

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[2] The government moved to dismiss one of the counts before trial, leaving 16.

himself was left with a deficit of over $170,000 from the transfers that fell outside this 60-day period, the lion's share of the loss. (ER 387).

By contrast, neither bank lost any money on account of Shaw's scheme. (ER 434; 615). The sole witness from Bank of America, a defense witness, testified unequivocally that Bank of America never paid out a single credit to Hsu in connection with this fraud, and that it suffered no actual loss. (ER 615). Instead, when Hsu finally reported the fraud to Bank of America, the bank passed his complaint onto Paypal, the entity that effected the withdrawals; eight days later, Paypal deposited credits for the preceding 60-day-period directly into Hsu's account. (ER 613-614). As to Washington Mutual, the government's only bank witness testified that, "if the account was opened fraudulently to begin with" – which was in fact the government's theory, given that Shaw opened the accounts in his father's name – "[w]e are not going to be at a loss" or bear the risk of loss. (ER 428).

Further, given Shaw's use of non-bank-entity Paypal to effectuate the withdrawals, and Hsu's failure to timely review the bank statements he had sent, month after month, to Shaw's home, Paypal and Hsu -- not the banks -- also bore the risk of loss in this case. (ER 429) (outside of industry-standard 60-day period for reviewing statements and reporting fraud, bank customer assumes risk of loss); (ER 336-37; 387) (because Hsu did not review his statements, he assumed risk of loss outside of this period); (ER 385-87; 613-14) (Paypal assumed risk of loss for fraud within 60-day-period insofar as it promptly issued credits to Hsu, once Hsu contacted Bank of America, without question or dispute).

3. At trial, the government never argued that Shaw intended to cheat either bank as opposed to just bank-customer Hsu. Rather, the government's theory was simply that Shaw deceived the banks in order to take Hsu's money, and that was all subsection (1) required. (ER 666).

The lynchpin of Shaw's trial defense was that subsection (1) requires proof of an intent to cheat a bank and not just a bank-customer. (ER 12-31, 37-74; 101 104; 105-116; CR 100-102). In furtherance of this defense, Shaw asked the court to give jury instructions for bank fraud that would have required the jury to find the requisite proof of Shaw's intent to deceive and cheat the banks (including definitions for the key terms "scheme to defraud" and "intent to defraud," as well as a theory of defense instruction). (ER 101-116; CR 100-102).

The district court declined to give Shaw's proposed instructions, and instead defined the key terms "intent to defraud" and "scheme to defraud" in disjunctive form to require proof of an "intent to deceive or cheat" the financial institution. (ER 18; 145-47; CR 98) (emphasis added). The court's instructions thus invited the jury to convict Shaw on the basis that he deceived the banks in order to take Hsu's money. The government then capitalized on the court's instruction in closing, arguing that Shaw "lied to the banks about important material things. .because he did that, defendant is guilty of all 16 counts of bank fraud with which he is charged." (ER 666) (emphasis added). Later that day, the jury convicted Shaw of all but two counts for transactions that were not clearly traceable to the fraud. (ER 704; CR 96).

Shaw moved for judgment of acquittal after the close of the government's case and again after the close of all of the evidence. (ER 204; 622). At the hearing on the proposed jury instructions and the motions for judgment of acquittal, Shaw emphasized that the issue in dispute was how to define the statutory elements that both parties believed to be prerequisite to a conviction -- "scheme to defraud" and "intent to defraud" -- for purposes of subsection (1) bank fraud, not whether there was an "additional element" of proof of "risk of loss," as the government had framed the question. (ER 624-25; 646-47). Rather, Shaw argued, proof of actual or potential loss to a bank is only relevant to the extent that it supports an inference that the defendant intended to cheat a bank and not just a third-party (ER 647). With respect to these requisite elements, Shaw argued, the government must prove that the bank is the target of the deception and an intended victim of the fraud, which it had not done. (ER 624-25; 646-47). By contrast, subsection (2) of the bank-fraud statute covers schemes, like Shaw's, that aimed to obtain a bank-account holder's money through mere deception of the bank. (ER 625; 644; 648).

Notwithstanding the absence of evidence to prove that Shaw intended to cheat a bank, the district court denied Shaw's motions for entry of a judgment of acquittal based on its interpretation of subsection (1) to require mere deception of the bank. (ER 651). The government never asserted, nor did the court find, that assuming arguendo Shaw's construction of subsection (1), there was sufficient proof of his intent to cheat a bank and not just Hsu. (ER 644-651).

4. On appeal, Shaw challenged the district court's denial of his Rule 29 motions and his proposed jury instructions. (Appellant's Opening Brief ("AOB")). Although the government attempted to dispute the evidence of loss and risk of loss to the banks (Appellant's Reply Brief "ARB" at 1-3), once more the government failed to assert, at any point in the appellate proceedings, that there was any proof of Shaw's intent to cheat a bank and not just Hsu -- i.e. that any such purported evidence constituted circumstantial evidence of Shaw's intent. (Government Answering Brief ("GAB")).

The Ninth Circuit affirmed. (Pet. App. A). In so doing, the Ninth Circuit, like the district court, never questioned the fact that Shaw intended only to cheat Hsu, not the banks. (Pet. App. A14). It also acknowledged a circuit split in which other courts of appeals have sided with Shaw's construction of subsection (1) of §1344. (Pet. App. A4; A14). Nonetheless, the court joined the minority view and held that the statute is violated where the bank is the target of the deception and bank customers the only intended financial victims of the fraud. (Pet. App. A4). In so holding, the court reasoned that Ninth Circuit law "help[ed] to define the meaning in this circuit of §1344(1)'s element of intent 'to defraud,' and establish[ed] that it does not include intent to financially victimize the bank." (Pet. App. A4). The court also reasoned that this "result is fully consistent with the Supreme Court's decision in Loughrin, and indeed complements Loughrin's holding that § 1344(2) of the statute does not require any intent to defraud the bank." (Pet. App. A4).

The Ninth Circuit subsequently denied a petition for rehearing en banc. (Pet. App. B).

REASONS FOR GRANTING THE WRIT

"Although §1344 has produced much litigation in the Circuits and many separate opinions by learned appellate judges, federal courts do not agree on the mental state necessary to support a conviction under §1344[.]" United States v. Nkansah, 699 F.3d 743, 762 (2d Cir. 2012) (Lynch, J., concurring). This is still true as to subsection (1) of the bank-fraud statute after Loughrin.

Although Loughrin clarified the requisite mens rea for purposes of subsection (2) last year, when it held that §1344(2) does not require proof of a scheme, and thus an intent, "to defraud a financial institution" at all, it did not address what this language means. See Loughrin, 134 S.Ct. at 2384. Because subsection (1) does, by its terms, require evidence of a "scheme to defraud a financial institution," unlike subsection (2), the inter-circuit split endures about whether the first clause of the statute requires proof of an intent not only to deceive, but also to cheat, a bank, as nine circuits -- the First, Second, Third, Fourth, Fifth, Seventh, Tenth, Eleventh and D.C. Circuits -- agree, and as petitioner Shaw argued here.

That is the question presented here, where Shaw's scheme was directed at a non-bank third-party, bank-account-holder Stanley Hsu. The Ninth Circuit joined the minority view in the split, and affirmed Shaw's convictions under subsection (1) of the statute for his scheme to steal bank-customer Hsu's money from his bank account, even though the government never argued during trial, or at any point on

appeal, that there was evidence of Shaw's intent to cheat the bank as opposed to Hsu, and neither the district court, nor the court of appeals, questioned the fact that Shaw intended only to cheat bank-customer Hsu and not the banks. In so holding, the Ninth Circuit construed §1344(1) to require proof of an intent to deceive -- but not to cheat -- a bank, in accordance with the Sixth and Eighth Circuits. (Pet. App. A4).

The split -- now nine-to-three -- has thus increased after Loughrin with the Ninth Circuit's decision here, and every circuit now having weighed in on the question. As set forth below, this case presents an excellent vehicle for the Court finally to resolve the enduring post-Loughrin circuit conflict over the bank-fraud statute.

I. After Loughrin, The Courts Of Appeals Remain Increasingly Divided, Now Nine-To-Three, Over Section 1344(1)'s Intent Requirement

A. Loughrin Did Not Resolve The Conflict Over §1344(1)

Petitioner Loughrin construed the two subsections of the statute conjunctively, and argued that subsection (2), like subsection (1), requires proof of an "intent to defraud a financial institution." Loughrin, 134 S.Ct. at 2389. According to Loughrin, this element required the government "to show not just that a defendant intended to obtain bank property (as the jury [t]here found), but also that he specifically intended to deceive a bank," Loughrin, 134 S.Ct. at 2389 (emphasis added) -- proof, in other words, of an intent to deceive and cheat the

bank, as the majority of circuits have held as to subsection (1) and as Shaw contends here. Because the government did not contest this definition of "intent to defraud," and Loughrin conceded sufficient evidence of the intent-to-obtain-bank-property prong, the dispute centered on whether subsection (2) required proof of Loughrin's intent to deceive a bank. Id. at 2389 & n.3. The Court noted nonetheless that "[t]he Government in such a case may, of course, face the separate claim" -- Shaw's claim -- "that the defendant did not intend to obtain bank property at all." Id. at 2394 n.6 (emphasis added).

In that context, the Court held that the two subsections were legally distinct, abrogating circuit caselaw that construed the subsections conjunctively, and further, that subsection (2), unlike subsection (1), did not require proof of intent to deceive a bank. Loughrin, 134 S.Ct. at 2390-91. Whereas subsection (2) only "demands that the defendant's false statement is the mechanism naturally inducing a bank (or custodian) to part with its money," id. at 2393, the Court explained, it is "the first clause of §1344, as all agree," that "includes the requirement that a defendant intend to 'defraud a financial institution.'" Id. at 2389-90 (emphasis in original). The question thus remains: How must the government prove the "intent to defraud a financial institution" that "all agree" is required by subsection (1) where a scheme is designed to cheat a non-bank third-party?

B. The Circuits Remain Openly, And Now Increasingly, Divided Over §1344(1)

The courts of appeals remain openly, and now increasingly, divided over that question, since Loughrin did not address it. See, e.g., United States v. Shaw, 781 F.3d 1130, 1136 (9th Cir. 2015) (Pet. App. A14) (recognizing, post-Loughrin, the enduring circuit conflict over the requisite proof for §1344(1) and the fact that the Ninth Circuit's decision is contra other circuits); see also United States v. Staples, 435 F.3d 860, 866- 867 (8th Cir. 2006) (noting circuit split as to whether bank-fraud statute, generally, extends to situations where the defendant has no intent to expose the bank to an actual or potential loss); United States v. Everett, 270 F.3d 986, 990 (6th Cir. 2001) ("The Circuits are not in accord as to the intent required to violate §1344."); United States v. Thomas, 315 F.3d 190, 196 (3d Cir. 2002) ("The Courts of Appeals are not of one mind as to the proper reading of the statute, including. .the intent requirement[.]"); United States v. Kenrick, 221 F.3d 19, 27 (1st Cir. 2000) (en banc) ("There is also no consensus among the circuits on the issue.").

C. Nine Circuits Agree With Shaw's Construction Of §1344(1) To Require Proof of An Intent to Cheat A Bank

A majority of courts, from nine circuits, agree that proof of an intent to cheat, and not just deceive, a bank is a prerequisite to a conviction under §1344(1). Within this consensus, most courts of appeal have also opined about whether evidence of loss or risk of loss to the bank is necessary or merely permissible circumstantial

evidence of mens rea. See, e.g., United States v. Wolfswinkel, 44 F.3d 782, 785-786 (9th Cir.1995) ("The Courts of Appeals that have adopted a 'risk of loss' analysis have not made clear whether its proof is necessary or merely sufficient to show intent."). While the First, Third and Tenth Circuits have held proof of potential loss to a bank to be necessary evidence of the requisite mens rea, the Fourth, Fifth and Eleventh Circuits have held it to be permissible circumstantial evidence of intent, and the Second Circuit has held it to be permissible circumstantial evidence only where a bank's exposure is widely known.

Specifically, prior to Loughrin, a group of four circuits -- the Fourth, Fifth, Seventh, and Tenth -- had read subsections (1) and (2) disjunctively to create two substantive offenses, as Loughrin did, and in that context, held, as Shaw asserts here, that subsection (1) requires proof of an intent to cheat the bank, which subsection (2) does not. A second group of four circuits -- the First, Second, Third and the D.C. Circuit -- (as well as the Fifth Circuit, in certain other cases) had construed the two subsections of the bank-fraud statute conjunctively but held nonetheless that §1344 fails to cover schemes that were not designed to cheat the bank. While Loughrin abrogated the latter set of cases to the extent they construed the subsections conjunctively and applied the "intent to defraud a financial institution" element to subsection (2) as well as (1), their interpretation of what proof is required by the "intent to defraud a financial institution" that appears on the face of section (1) remains the law in these circuits for purposes of §1344(1).

For example, in the first group of cases construing the statute disjunctively, the Fifth Circuit, has held, in United States v. Briggs, 939 F.2d 222 (5th Cir. 1991), that §1344(a)(1) (now §1344(1)) did not apply to a scheme that, like Shaw's, was designed to take a third-party's money by effectuating transfers from his bank account into accounts controlled by the defendant:

> The record does not indicate that the banks suffered any loss, actual or potential, as a result of Briggs' conduct; indeed, the government does not argue that she attempted to obtain funds belonging to the banks, but only that she attempted to obtain funds under the custody and control of the bank.

Id. at 225 (emphasis added). The latter, the court reasoned, constitutes "a violation of subsection (a)(2), not (a)(1)." Id., see also United States v. Hooten, 933 F.2d 293, 295 (5th Cir. 1991) ("Under 18 U.S.C. §1344(a)(1), the victim must be a federally chartered or federally issued institution."); cf. United States v. Morganfield, 501 F.3d 453, 465 (5th Cir. 2007) (construing the statute conjunctively, instead, and holding that when a defendant targets third-party merchants, the government must present facts "evincing an intent to victimize the financial institution to sustain a bank fraud charge under §1344"). In this context, the Fifth Circuit has held that proof of loss or risk of loss is permissible circumstantial evidence of the requisite intent. See United States v. Barakett, 994 F.2d 1107, 1111 (5th Cir. 1993) ("While section 1344(1) prohibits only crimes directed at financial institutions. . .knowing execution of schemes causing risk of loss-rather than actual loss-to the institution, can be sufficient to support conviction.").

Likewise, the Fourth Circuit has recognized subsection (1) and (2) as distinct substantive offenses, see United States v. Brandon, 298 F.3d 307, 311 (4th Cir. 2002), and has held that a "scheme to defraud a financial institution" requires that "such a scheme or artifice must be one designed to deprive a financial institution of a property interest." United States v. Colton, 231 F.3d 890, 907-08 (4th Cir. 2000) (emphasis added and in original); see also Brandon, 298 F.3d at 311 (bank must be "intended victim" of deceptive scheme). In so holding, the court relied on this Court's decision in McNally v. United States, which addressed the mail-fraud statute: "[T]he words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes.'" Colton, 231 F.3d at 907 (quoting McNally, 483 U.S. 350, 358 (1987)). In this context, the court held that proof of risk of loss is not necessary, but can be circumstantial evidence of intent. See United States. v. Adepoju, 756 F.3d 250, 255 (4th Cir. 2014) ("Risk of loss to the bank is unnecessary for a §1344(1) conviction, although it tends to prove the requisite intent under that subsection.").

The Seventh Circuit has reached the same conclusion about mens rea, construing the statute disjunctively, and holding that, "[i]n order to support a conviction under §1344(1), the government must prove that the defendant engaged in a pattern or course of conduct designed to deceive a financial institution with the intent to cause actual or potential loss." United States v. Higgins, 270 F.3d 1070, 1073-74 (7th Cir. 2001) (emphasis added).

The Tenth Circuit is in accord, construing the statute disjunctively and holding that "victimiz[ing]" a bank is "a requirement of §1344(1) that is not necessary under §1344(2)." United States v. Young, 952 F.2d 1252, 1256 n.4 (10th Cir. 1991) (emphasis added); United States v. Sapp, 53 F.3d 1100, 1102 (10th Cir. 1995) (same). In this context, this court has held that proof of risk of loss to a bank is both necessary and sufficient to meet this showing. See United States v. Loughrin, 710 F.3d 1111, 1115 (10th Cir. 2013) ("To establish that a bank was defrauded under §1344(1), the government need not prove that the bank 'suffered any monetary loss, only that the bank was put at potential risk by the scheme to defraud.'") (quoting Young), abrogated in part by Loughrin, 134 S.Ct. 2384.

Turning to the second group of circuits that ascribe to the majority view -- courts that, before Loughrin, interpreted the subsections conjunctively -- the Second Circuit has held, in United States v. Rodriguez, 140 F.3d 163, 168 (2d Cir. 1998), that "a defendant may not be convicted of federal bank fraud unless the government is able to offer proof that the defendant, through the scheme, intended to victimize the bank by exposing it to an actual or potential loss." Id. (emphasis added); see also Nkansah, 699 F.3d at 748 (bank fraud "is a specific intent crime requiring proof of an intent to victimize a bank by fraud," and thus, "the government had to prove beyond a reasonable doubt that appellant intended to expose the banks to losses"). In this context, the court has underscored that proof of actual and potential loss to the bank may -- in certain circumstances but not others -- constitute circumstantial evidence of mens rea. Id. at 750. The court has reasoned:

> the widely understood exposure of a bank in such a case is only a fact sufficient to support an inference of the requisite state of mind. Someone may well forge a check believing that only the account holder will suffer a loss. The inference is, therefore, not mandatory, but permissible.

Id. (emphasis added). By contrast, however, "such a permissible inference cannot be extended to cases in which evidence of the state of mind is absent and the actual exposure of a bank to losses is unclear, remote, or non-existent." Id. (emphasis added).

The D.C. Circuit has also construed the two subsections of the bank-fraud statute conjunctively, and has held, in reliance on Second-Circuit caselaw, that "§1344 only covers frauds against banks themselves" -- that is, schemes designed to "defraud[] the bank of its property interest." United States v. Hubbard, 889 F.2d 277, 280 (D.C. Cir. 1989) (citing Blackmon, supra) (emphasis added).

Similarly, the Eleventh Circuit, in United States v. De La Mata, 266 F.3d 1275, 1298 (11th Cir. 2001), has construed §1344 conjunctively, pre-Loughrin, and held that "the term 'scheme to defraud' includes 'any pattern or cause of action, including false and fraudulent pretenses and misrepresentations, intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived.'" Id. at 1298 (emphasis added) (citation omitted). The court has further held that "'risk of loss' is merely one way of establishing intent to defraud in bank fraud cases." See id.

Like these circuits, the Third Circuit had also interpreted the bank-fraud statute conjunctively, and held it to require proof of an intent to cheat a bank. See,

e.g., Thomas, 315 F.3d at 200 (holding that "harm or loss to the bank must be contemplated by the wrongdoer to make out a crime of bank fraud"); id. at 202 ("[e]ven a scheme which does expose a bank to a loss must be so intended") (emphasis added). Like the Tenth Circuit, the court has further held that evidence of loss or risk of loss is a required showing. United States v. Leahy, 445 F.3d 634, 657 (3d Cir. 2006) ("§1344 requires that the fraudulent scheme exposed the bank to some type of loss.") (emphasis added).

Finally, in Kenrick, supra, the First Circuit construed the two subsections conjunctively, pre-Loughrin, holding that "the intent element of bank fraud under either subsection is an intent to deceive the bank in order to obtain from it money or other property" Kenrick, 221 F.3d at 29; see also United States v. Brandon, 17 F.3d 409 (1st Cir. 1994) ("The specific intent under §1344 is an intent to defraud a bank, that is, an intent to victimize a bank by means of a fraudulent scheme.") (emphasis added). The court has further held that, in line with the Third and Tenth Circuits, that proof of potential loss to the bank is a required showing. United States v. Moran, 312 F.3d 480, 489 (1st Cir. 2002) ("[T]he bank need not be the immediate victim of the fraudulent scheme and need not have suffered actual loss so long as the requisite intent is established and the bank was exposed to a risk of loss.") (emphasis added).

D. Three Circuits Have Construed §1344(1) To Require Mere Deception Of A Bank

Against the weight of authority that supports Shaw's construction of §1344(1) to require proof of an intent to cheat a bank, prior to the Ninth Circuit's decision in this case, only two circuits -- the Sixth and Eighth -- had held that bank fraud does not require proof of an intent to harm the bank.

In Staples, supra, the Eighth Circuit construed the two subsections of bank fraud disjunctively, as in Loughrin, and held: "As for subsection (1), we have held that no actual loss or intent to cause a loss is required, so long as the defendant has 'defraud[ed]' a financial institution.'" Staples, 435 F.3d at 867 (emphasis added).

Likewise, in Everett, supra, although the Sixth Circuit construed the two subsections of Section 1344 conjunctively, it resolved a prior intra-circuit split as to the requisite intent for bank fraud in accordance with the Eighth Circuit's view, holding that "to have the specific intent required for bank fraud the defendant need not have put the bank at risk of loss in the usual sense or intended to do so;" rather, "[i]t is sufficient if the defendant in the course of committing fraud on someone causes a federally insured bank to transfer funds under its possession and control." Everett, 270 F.3d at 991 (emphasis added); see also United States v. Warshak, 631 F.3d 266, 313 (6th Cir.2010) (same); United States v. Reaume, 338 F.3d 577, 581 (6th Cir. 2003) ("[T]he bank fraud statute is violated, even if the intended victim of the fraudulent activity is an entity other than a federally insured

financial institution, when the fraudulent activity causes the bank to transfer funds.").

E. The Ninth Circuit's Interpretation Of Section 1344(1)'s Intent Requirement Is Wrong, And Further Cleaves The Divide

The majority view supports Shaw's position that proof of intent to cheat the bank itself, not just a bank customer, is the hallmark of subsection (1) bank fraud -- and, further, that proof of actual loss or risk of loss to the bank is relevant only to the extent that it is circumstantial evidence of the requisite intent.

By joining the minority view, the Ninth Circuit further cleaved a circuit divide which now tallies nine-to-three. The Ninth Circuit held that "Section 1344(1) does require intent to defraud the bank," by contrast to subsection (2), but not that "the bank. . .be the intended financial victim of the fraud." (Pet. App. A4). Rather, proof of mere deception of the bank is enough. (Pet. App. A4). Its decision is not only contrary to the majority view in the courts of appeal, but to this Court's jurisprudence as well.

As a preliminary matter, the Court's holding conflicts with McNally, supra, which held, in the context of the mail-fraud statute, that "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" McNally, 483 U.S. 350, 358 (1987) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)) (emphasis added). The

Court has thus made clear that, for purposes of the word "defraud," the intent must be to obtain money or property from the one who is deceived. See id. McNally supports a construction of subsection (1) to require proof of an intent to deceive and cheat a bank, as Shaw contends, not merely an intent to deceive the bank in order to cheat a third party, as the Ninth Circuit held. As noted above, at least one Circuit -- the Fourth -- has relied on McNally to construe subsection (1) as Shaw does here.

Further, the Ninth Circuit's construction of subsection (1) to require mere proof of deception of the bank virtually dissolves the distinction with subsection (2) after Loughrin, given Loughrin's recognition that a subsection (2) violation "occurs, most clearly, when a defendant makes a misrepresentation to the bank itself." Loughrin, 124 S.Ct. at 2393. In this analysis, the "clearest" subsection (2) violation would also be a violation of subsection (1), if the first clause requires no more than deception of the bank. The court's construction thus exceeds the "substantial overlap" between the subsections that Loughrin endorsed, id. at 2390 n.4, and comes into conflict with Loughrin insofar as it underscored that the disjunctive structure of the bank-fraud statute nonetheless "signal[s] that each [clause] is intended to have separate meaning," id. at 2391. Thus, "to read clause (1) as fully encompassing clause (2)" -- or, effectively, vice versa -- "contravenes two related interpretive canons: that different language signals different meaning, and that no part of a statute should be superfluous." Id. at 2388-90.

Finally, the Ninth Circuit misperceived Loughrin as "confirming [its] conclusion that the difference between the two clauses is which entity the defendant intended to deceive, not which entity the defendant intended to bear the financial loss" insofar as it "counsels against entangling courts in technical issues of banking law about whether the financial institution or, alternatively, a depositor would suffer the loss from a successful fraud." (Pet. App. A13-14). But Shaw's position is not that §1344(1) requires proof of "risk of loss," and thus evidence of "technical issues of banking law," but rather proof that the defendant intended to expose the bank to actual or potential loss. In this respect, the mens rea analysis for §1344(1) is no different than for any other specific intent crime, which requires juries to pass judgment, based on direct and circumstantial evidence, about the inner workings of the human mind.

Further, in most subsection (1) cases, the design of the scheme unambiguously targets the bank and not a bank-customer, making it an easy task for the government to prove, and juries to infer, that a defendant's intent was to victimize the bank through fraud. See e.g. Shaw, 781 F.3d 1130, 1135 (9th Cir. 2015) (Pet. App. A12-13) (discussing United States v. Wolfswinkel, 44 F.3d 782, 786 (9th Cir. 1995), a subsection (1) case in which the government presented uncontroverted testimony that the bank was obligated to pay a cashier's check written on non-sufficient funds, and the Ninth Circuit held that, to the extent evidence of "risk of loss" was required by §1344(1), "the government offered

sufficient evidence at trial to prove that the conduct for which appellant was convicted exposed at least one bank to a risk of loss").

And, as the Second Circuit reasoned in Nkansah, supra, where the technical ramifications of banking law, given a particular scheme's design, are less than clear, any "permissible inference" about the "requisite state of mind" from "the widely understood exposure of a bank" "cannot be extended to cases," like Shaw's, "in which evidence of the state of mind is absent and the actual exposure of a bank to losses is unclear, remote, or non-existent." See Nkansah, 699 F.3d at 750. In such cases, where intent is absent or unclear for purposes of subsection (1), the "substantial" "overlap" that Loughrin recognized between §1344(1) and §1344(2), see Loughrin, 124 S.Ct. at 2390 n.4, means that the government will not be left without a recourse: Provided there is a misrepresentation, it will have the option of proceeding under subsection (2) instead, which dispenses with proof of such intent and covers schemes that target a range of property interests common in banking contexts, including the relationship between a bank and a customer with a deposit account.

II. As Shaw Illustrates, The Conflict Over §1344(1)'s Intent Requirement Is Unlikely To Be Clarified By Further Decisions In The Court Of Appeals

Because Loughrin did not address what "intent to defraud a financial institution" means but held that such proof is not required for subsection (2) at all, circuit courts from both sides of the divide can continue to invoke Loughrin as

consistent with their respective, entrenched positions. The Ninth Circuit's decision here, which accentuated the circuit split, is illustration of the lack of movement toward a consensus position in the wake of the question left open in Loughrin: the court joined the minority view though aware of other circuits' contrary decisions, and invoked Loughrin to support its conclusion about subsection (1), even though Loughrin was tethered to subsection (2). Indeed, the Ninth Circuit invoked Loughrin, despite this Court underscoring that the district court's subsection (1) analysis, and resulting grant of judgment of acquittal, was "not material" to the question presented there. Loughrin, 134 S.Ct at 2388. Nor would additional percolation benefit this Court, given that it has already analyzed the text and history of the statute and relevant caselaw for purposes of Loughrin, and the question has now been addressed by each of the courts of appeals.

III. Following Loughrin, This Case Presents An Excellent Vehicle For Resolving The Enduring, And Increased, Circuit Split

This case presents an excellent vehicle for resolving the enduring conflict over subsection (1)'s intent requirement. First, the court of appeals directly addressed the question presented. (Pet. App. A3). Second, the court's answer to the question determined the outcome of the case; indeed, Shaw's sole defense was built around the interpretation of "intent to defraud a financial institution" for purposes of Section 1344(1), advanced herein. Third, the government never argued at trial, nor asserted at any time on appeal, that there was evidence to support a finding that Shaw intended to cheat a bank as opposed to just Hsu. Finally, neither the

district court nor the Ninth Circuit questioned the lack of evidence that Shaw intended to cheat a bank, as opposed to just Hsu. The Ninth Circuit upheld Shaw's convictions for the sole reason that it construed Section 1344(1) to require only an intent to deceive, and not cheat, the bank. (Pet. App. A15).

IV. The Question Presented Arises Often And Is Outcome-Determinative For Many Federal Prosecutions

Just as with subsection (2), subsection (1) bank fraud is a federal crime that is frequently charged as a stand-alone offense, and also as a predicate in connection with other federal offenses, like aggravated identity theft and racketeering, 18 U.S.C. §§ 1028A; 1961(1). That will be all the more true now that this Court has clarified the disjunctive construction of a statute that a number of circuit courts had previously construed conjunctively, as discussed supra Section I, and thus made clear that subsection (1) is a legally-distinct crime from subsection (2). Because the statute is important, the question presented here will repeat, and the existing conflict will endure and, as evidenced by the Ninth Circuit's decision, has in fact increased, in the wake of Loughrin, intervention by this Court to ensure a uniform application to defendants across different jurisdictions is warranted.

CONCLUSION

For all the foregoing reasons, petitioner submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

HILARY L. POTASHNER
Federal Public Defender

DATED: September 4, 2015

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Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LAWRENCE EUGENE SHAW, *Defendant-Appellant.*	No. 13-50136 D.C. No. 2:12-cr-00862-JFW-1 OPINION

Appeal from the United States District Court
for the Central District of California
John F Walter, District Judge, Presiding

Argued and Submitted
November 17, 2014—Pasadena California

Filed March 27, 2015

Before: Mary M. Schroeder, Harry Pregerson,
and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY*

Criminal Law

The panel affirmed a conviction for a scheme to defraud a financial institution, in violation of 18 U.S.C. § 1344(1), in a case in which the defendant used PayPal to convince banks that he was a particular bank customer and thus had authority to transfer money out of that customer's bank accounts and into a PayPal account in the defendant's control.

The panel held that for a violation of § 1344(1), the government need not prove that the defendant intended the bank to be the principal financial victim of the fraud, and that the district court therefore correctly refused jury instructions that included such a requirement.

COUNSEL

Sean Kennedy, Federal Public Defender, Koren L. Bell (argued), Deputy Federal Public Defender, Los Angeles, California, for Defendant-Appellant.

André Birotte, Jr., United States Attorney, Robert E. Dugdale, Assistant United States Attorney, Tracy L. Wilkison (argued), Assistant United States Attorney, Los Angeles, California, for Plaintiff-Appellee.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

OPINION

SCHROEDER, Circuit Judge:

Congress enacted the Bank Fraud Act in 1984, and ever since, the federal courts have grappled with whether its provisions require proof of an intent to cause harm to the bank itself. The Act contains two clauses: the first criminalizes schemes "to defraud a financial institution," and the second schemes to obtain bank assets or property under its control "by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344. Last year, the Supreme Court held that the second clause does not require proof that the defendant intended to defraud the bank. *Loughrin v. United States*, 134 S. Ct. 2384, 2387 (2014). In this case, we deal with the first clause, which by its terms does require such proof. The question here is whether that means the government must prove the defendant intended the bank to be the principal financial victim of the fraud.

The principal intended victim in this case, at least according to the defendant, was a bank customer, Stanley Hsu. The defendant, Lawrence Shaw, had access to the victim's bank statements. The gist of Shaw's scheme was to use PayPal, an online payment and money transfer service, to convince the banks that he was Hsu and thus had authority to transfer money out of Hsu's bank accounts and into the PayPal account in Shaw's control.

The government charged Shaw with violating § 1344(1). Shaw sought a jury instruction that, under § 1344(1), the government had to prove not only that he intended to deceive the bank, but that he also intended to target the bank as the principal financial victim of the fraud, rather than the account

holder or PayPal. The district court refused to give such an instruction, concluding that clause 1 required proof only that the defendant intended to deceive the bank, not that he also intended the bank to bear the loss.

While the circuits are divided as to the requirements of § 1344(1), our Ninth Circuit case law answers Shaw's argument. We have held that, to the extent § 1344(1) requires any intent to expose the bank to a risk of loss, the requirement is easily satisfied by the bank's having to bear some potential administrative expenses that necessarily result from being defrauded. *See United States v. Wolfswinkel*, 44 F.3d 782, 786 (9th Cir. 1995). We did not hold that the bank needed to be the intended financial victim of the fraud. In this case, a principal intended financial victim of the fraud was the bank customer who held the account, and our law has dealt with that specific situation. We have held that the statute is violated where the bank is the target of the deception, even if bank customers were the intended financial victims of the fraud. *See United States v. Bonallo*, 858 F.2d 1427, 1429–30, 1430 n.2 (9th Cir. 1988).

These cases help define the meaning in this circuit of § 1344(1)'s element of intent "to defraud," and establish that it does not include intent to financially victimize the bank. That result is fully consistent with the Supreme Court's decision in *Loughrin*, and indeed complements *Loughrin*'s holding that § 1344(2) of the statute does not require any intent to defraud the bank. Section 1344(1) does require intent to defraud the bank, but neither clause requires the bank to be the intended financial victim of the fraud. We therefore affirm the conviction.

BACKGROUND

The charges in this case arose from a scheme defendant Shaw devised to take money from bank accounts belonging to Stanley Hsu, a Taiwanese businessman. Hsu opened a Bank of America account while working in the United States. When he returned to Taiwan, he arranged for the daughter of one of his employees to receive his mail in the States and forward it to him in Taiwan. Shaw was living with the daughter and routinely checked her mail. When Hsu's Bank of America statements began to arrive, Shaw opened them and learned Hsu's account and personal information.

Shaw used the information from Hsu's statements to execute the following scheme: he opened an email account in Hsu's name, then used this email account and Hsu's personal information to open a PayPal account. Shaw "linked" the PayPal account to Hsu's account with Bank of America. He was able to circumvent PayPal's security measures because of his access to the information in Hsu's bank statements.

On June 4, 2007, Shaw opened two accounts with Washington Mutual under the name of his father, Richard Shaw, without his father's knowledge or permission. One account was a savings account ("Tier 1" account), which Shaw linked to the fake Hsu PayPal account. During the process of linking the Tier 1 account with the Hsu PayPal account, PayPal identified the request as suspicious. PayPal sent an email to the fake Hsu email account asking for additional information. In response, Shaw faxed PayPal a copy of Hsu's Bank of America account statement, and a bank statement he had altered to appear as if Hsu owned the Richard Shaw accounts. He also sent a copy of Hsu's driver's license, which he had altered to have a younger birth

date. On the basis of these falsified documents, Washington Mutual and PayPal allowed the savings account in the name of Shaw's father and the PayPal account in Hsu's name to be linked.

The second account Shaw opened in his father's name was a checking account ("Tier 2" account). This account was linked to the Tier 1 savings account. Shaw's scheme ultimately siphoned the funds into a third Washington Mutual account, a joint account which Shaw had previously opened in his and the daughter's name, although without her knowledge.

Once the accounts were set up and linked, Shaw began to withdraw money from Hsu's Bank of America account through a series of online transfers and checks written to himself. He would transfer money from the Hsu Bank of America account first to the Hsu PayPal account, then transfer it from the Hsu PayPal account to the Tier 1 savings account with Washington Mutual. Then, Shaw would transfer money from the Tier 1 account to the Tier 2 checking account, which allowed him to write checks to himself, signing his father's name. Finally, he would deposit those checks into the Washington Mutual joint account that he controlled.

Using this scheme, Shaw was able to convince the banks to transfer and release approximately $307,000 of Hsu's money to Shaw between June and October 2007. Hsu's son discovered the missing money in October 2007, reported the fraud and closed the Bank of America account.

Bank of America returned approximately $131,000 to Hsu, covering the fraudulent activity that occurred within 60

days of the reported fraud. PayPal reimbursed Bank of America for this amount. In the end, PayPal bore approximately $106,000 of the loss and Hsu over $170,000, because Hsu did not notify the banks of the losses within 60 days of many of the fraudulent transactions, as the parties all agree was required by standard banking practice.

DISTRICT COURT PROCEEDINGS

The government charged Shaw with 17 counts of bank fraud in violation of § 1344(1) and in December 2012 the case went to trial before a jury. The defense theory was that a bank fraud conviction under § 1344(1) requires fraudulent intent to expose the bank itself to monetary loss, and Shaw intended only to expose PayPal and Stanley Hsu to any monetary loss. Shaw argued that "intent to defraud" means intent to deceive and cheat the bank. Shaw therefore asked for jury instructions which would require the government to prove that Shaw had intended the bank to be not only the target of the deception, but to suffer an actual loss or risk of loss as the financial victim of the fraud. His requested instructions provided:

> (1) The defendant knowingly carried out a scheme to defraud [the bank]; that is a scheme designed to victimize [the bank] by causing [the bank], not only Stanley Hsu, monetary loss;
>
> (2) The defendant actively deceived [the bank] as to a material fact; that is, a fact that had a natural tendency to influence, or was capable of influencing, [the bank] to part with money or property;

> (3) The defendant acted with the specific intent to defraud [the bank]; that is, with the intent to deceive and cheat [the bank] in order to expose [the bank], not only Stanley Hsu, to monetary loss.
>
> (4) [The bank] was federally insured by the FDIC.
>
> It is not enough for the government to prove that Mr. Shaw carried out a scheme to obtain Mr. Hsu's money by deceiving [the bank]. In order to convict Mr. Shaw, you must find that [the bank] itself was both the target of his deception and an intended victim of the fraud.

The district court declined to give Shaw's requested jury instructions. The district court concluded that risk of loss was an element that the bank fraud statute did not require, and that the bank need not be an intended financial victim of the fraud. Instead, the trial judge gave instructions based on a combination of model jury instructions and instructions used in previous bank fraud cases in the Ninth Circuit. The judge instructed the jury that:

> [i]n order for the defendant to be found guilty of bank fraud, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant knowingly executed a scheme to defraud a financial institution as to a material matter;

> Second, the defendant did so with the intent to defraud the financial institution; and
>
> Third, the financial institution was insured by the Federal Deposit Insurance Corporation.
>
> The phrase "scheme to defraud" means any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, or deprive a financial institution of something of value. It is not necessary for the government to prove that a financial institution was the only or sole victim of the scheme to defraud. It is also not necessary for the government to prove that the defendant was actually successful in defrauding any financial institution. Finally, it is not necessary for the government to prove that any financial institution lost any money or property as a result of the scheme to defraud.
>
> An intent to defraud is an intent to deceive or cheat.

The jury convicted Shaw of 14 counts of bank fraud on December 13, 2012, and this appeal followed.

DISCUSSION

The bank fraud statute, 18 U.S.C. § 1344, provides:

> Whoever knowingly executes, or attempts to execute a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

In *Loughrin v. United States*, the Supreme Court construed the second clause, and held that it does not require the government to prove that the defendant intended to defraud the bank. 134 S. Ct. 2384, 2387 (2014). Section 1344(2) targets schemes to obtain property held by the bank via misrepresentation to a third party, while § 1344(1) penalizes schemes to defraud the bank itself. *See id.* at 2389–92. The Supreme Court effectively required courts to treat the two clauses separately, holding that while they overlap substantially, the clauses are disjunctive and establish distinct offenses. *Id.* at 2390, 2390 n.4.

In holding that the two clauses create separate offenses, the Court rejected the reasoning of the Third Circuit. *See id.* at 2388–89. The Third Circuit held that clauses 1 and 2

conjunctively create only one offense, and thus all violations of the statute require both the intent to defraud the bank and that the bank be exposed to a risk of loss under the relevant law *United States v. Thomas*, 315 F.3d 190, 199–201 (3d Cir. 2002) (holding that under both clauses, "a defendant must intend to cause a bank a loss or potential liability, whether by way of statutory law, common law, or business practice" (internal quotation marks omitted)). The Supreme Court expressly held that § 1344(2) does not require either intent to defraud a bank or a risk of loss to a bank. *Loughrin*, 134 S. Ct. at 2389–90, 2395 n.9. In doing so, it emphasized that intent to defraud a bank is the essence of § 1344(1). *Id.* at 2389–90.

Shaw's argument in this case therefore focuses on the difference between the two clauses. He points out that the second clause covers schemes intended to obtain a third party's property. He argues that the first clause, under which he was convicted, therefore must require that a defendant intend to obtain the bank's property. Thus, he asks us to conclude that a conviction under § 1344(1) requires a showing that the defendant intended to expose the bank to the principal risk of loss. Such a requirement was not satisfied since, in this case, Shaw intended his principal target to have been the bank's customer, Hsu.

Shaw thus seeks to characterize the difference between the two clauses as involving the intended financial victim of the fraud, i.e., the intended bearer of the loss. The language of neither clause of the statute, however, refers to monetary loss or to the risk of such loss. The statutory language focuses on the intended victim of the deception, not the intended bearer of the loss. Section 1344(1) requires the intent to deceive the bank. Section 1344(2) requires false or

fraudulent representations or pretenses to third parties. The Supreme Court made this point in *Loughrin* when it noted that the second clause was intended to broaden the scope of bank fraud to include schemes that did not involve deception of the bank directly, such as schemes to use stolen credit cards. *See* 134 S. Ct. at 2391–92. Section 1344(1) thus covers schemes to deceive the bank directly. Neither clause requires the government to establish the defendant intended the bank to suffer a financial loss.

Analysis of our circuit's law before *Loughrin* counsels the same result. In *United States v. Bonallo*, 858 F.2d 1427 (9th Cir. 1988), we recognized that under § 1344(1) the bank itself need not be the sole or primary victim of the scheme. Rather, the bank is defrauded within the meaning of § 1344(1) when it is the target of the deceit, even if the scheme targeted the bank's customer accounts as the source of the money. *See id.* at 1434 n.9.

In *Bonallo*, a bank employee withdrew funds from his own account via the ATM, then manipulated the bank's computer system to charge the withdrawals against other customers' accounts. *Id.* at 1429–30. The defendant argued that the other customers were the intended victims of his scheme and therefore the bank was not defrauded within the meaning of the statute. We rejected this argument, finding that the bank was the target of his misrepresentation, even if the customers' accounts were the source of the funds. *See id.* at 1434 n.9. In short, the defendant was guilty of bank fraud because he intended to deceive the bank.

In *United States v. Wolfswinkel*, 44 F.3d 782 (9th Cir. 1995), we considered whether a risk of financial loss to a bank was as an element of § 1344(1). We held that even if

there were such a requirement of financial loss to the bank, it was easily satisfied. The defendant was convicted of bank fraud under § 1344(1) after he engaged in a check-kiting scheme, during which he convinced a bank officer to sell him cashier's checks paid for with insufficiently-backed checks. *Id.* at 784. On appeal, Wolfswinkel argued that the government had to show he exposed the bank to a risk of loss under § 1344(1), and he had not, because he provided collateral to the bank to secure any losses for the bounced checks. *Id.* at 785–86.

In affirming Wolfswinkel's conviction, we recognized a circuit split as to whether § 1344(1) requires proof of risk of loss to the bank to establish the defendant's intent to defraud. *Id.* at 786. We held, however, that even assuming there were such a requirement, Wolfswinkel's scheme satisfied it. *See id.* Although he had provided security for potential losses, Wolfswinkel exposed the bank to a risk of loss in the form of administrative costs and the threat of competing creditor claims if it were forced to liquidate the collateral. *Id.* The defendant need not have intended the bank to bear the risk of losing the amount involved in the financial scheme itself.

The Supreme Court's decision in *Loughrin* does not affect the validity of our precedent, or undermine it in any way. If anything, it lends credence to our reluctance to impose any risk of loss requirement in a prosecution under the bank fraud statute. *Loughrin* confirms our conclusion that the difference between the two clauses is which entity the defendant intended to deceive, not which entity the defendant intended to bear the financial loss. *See* 134 S. Ct. at 2389–90 (emphasizing that nothing in § 1344(2) requires specific intent to deceive a bank, which § 1344(1) already covers).

Shaw stresses that under the applicable law, the bank, in the end, did not actually lose anything. The losses ultimately fell on Hsu for failing to spot much of the fraud within the legally required 60 days, and on PayPal, which had to reimburse the bank for the rest. Shaw therefore asks us to conclude that he could not have intended to defraud the bank. A similar argument with respect to clause 2 was dismissed summarily in *Loughrin* on the ground that the federal statute was intended to avoid having cases turn on the technical ramifications of banking law. *Id.* at 2395 n.9. In characterizing § 1344(2), the Court said that the language "appears calculated to avoid entangling courts in technical issues of banking law about whether the financial institution or, alternatively, a depositor would suffer the loss from a successful fraud." *Id.* We conclude that the same legislative intent must be ascribed to § 1344(1). There is no reason to believe Congress wanted courts to become more entangled in such technical issues under the first clause than under the second clause.

We recognize that some circuits have held that risk of financial loss to the bank is an element that must be proven under § 1344(1). *See, e.g.*, *United States v. Staples*, 435 F.3d 860, 866–67 (8th Cir. 2006) (discussing difference of opinion among circuits on whether intent to harm or cause the bank a risk of loss is required). The reason given is that the purpose of the statute is protection of the federal fisc, and that purpose is not served if the bank faces no financial risk. *See, e.g.*, *Thomas*, 315 F.3d at 201. Circuits adopting the requirement cite to the legislative history of the bank fraud statute, which shows that Congress enacted it because of the "strong federal interest in protecting the financial integrity of [federally insured financial] institutions." *See, e.g.*, *id.* (quoting S. Rep. No. 98-225, at 377 (1984), *reprinted in* 1984

U.S.C.C.A.N. 3182, 3517.); *United States v. Nkansah*, 699 F.3d 743, 759 (2d Cir. 2012) (same). But requiring proof of intent that a bank bear a risk of loss does not serve this end. The entity that bears the risk of loss does not necessarily depend upon the entity (i.e., the federally insured financial institution) that the defendant intends to harm. It depends on the operation of banking laws that, as this case demonstrates, may result in having the instruments of the fraud, like the bank's customers or entities like PayPal, ultimately bear the loss. A scheme that is intended to harm third parties may, in fact, end up hurting the bank, and vice versa. Few criminals have any knowledge of the rules of law that govern which entity bears the risk of loss. Requiring intent to harm the bank only makes it more difficult to prosecute bank fraud. *Nkansah*, 699 F.3d at 759 (Lynch, J., concurring); *see also Loughrin*, 134 S. Ct. at 2395 n.9 (citing *Nkansah* concurrence with approval).

The Court in *Loughrin* held that § 1344(2) does not require intent to defraud a bank because the plain language of that section includes no such requirement. 134 S. Ct. at 2389–2390. We similarly decline to read an additional element into § 1344(1) that Congress did not include; that does not serve the Congressional purpose; and that could needlessly entangle judges and juries in the intricacies of banking law. The district court correctly refused instructions that included such a requirement.

AFFIRMED.

Appendix B

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. LAWRENCE EUGENE SHAW, Defendant - Appellant.	No. 13-50136 D.C. No. 2:12-cr-00862-JFW-1 Central District of California, Los Angeles ORDER

Before: SCHROEDER, PREGERSON, and NGUYEN, Circuit Judges.

The panel has voted to deny Appellant's petition for panel rehearing. Judges Pregerson and Nguyen have voted to deny the petition for rehearing en banc, and Judge Schroeder has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for panel rehearing and petition for rehearing en banc are denied. Further petitions for rehearing and rehearing en banc shall not be entertained.

ORIGINAL

No. 15-5991

Supreme Court, U.S.
FILED
MAR - 8 2016
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IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE EUGENE SHAW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a bank-fraud offense under 18 U.S.C. 1344(1) requires proof that the defendant intended to expose the defrauded bank to a financial loss or a risk of loss.

IN THE SUPREME COURT OF THE UNITED STATES

No. 15-5991

LAWRENCE EUGENE SHAW, PETITIONER

v.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 781 F 3d 1130.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2015 A petition for rehearing was denied on June 8, 2015 (Pet. App. B1). The petition for a writ of certiorari was filed on September 4, 2015. The jurisdiction of this Court is invoked under 28 U.S.C 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on 14 counts of bank fraud, in violation of 18 U.S.C. 1344(1) and 2. Judgment 1. The district court sentenced petitioner to 57 months of imprisonment, to be followed by five years of supervised release. Ibid. The court of appeals affirmed. Pet. App. A1-A15.

1. Petitioner's counts of conviction stem from his fraudulent scheme to obtain funds from Bank of America (BoA) through transfers from BoA accounts owned by Stanley Hsu. Hsu had worked and raised his children in the United States before moving to Taiwan. In connection with that move, Hsu arranged to have Beatrice Fu -- the daughter of one of his company's employees -- receive his mail at her residence in the United States and forward the mail to him in Taiwan. Petitioner lived with Fu, had no outside employment, and routinely retrieved the household mail. In 2007, petitioner intercepted Hsu's BoA bank statements from the mail, opened them, and used the information about Hsu's accounts to syphon funds from them by a fraudulent scheme. Pet. App. A5; Gov't C.A. Br. 4.

Petitioner executed a series of fraudulent banking transactions using multiple accounts at BoA, PayPal, and Washington Mutual Bank Pet. App A5-A6 First, petitioner established a

PayPal account using Hsu's personal information and an email account that he created in Hsu's name. Petitioner electronically linked the fraudulent Hsu PayPal account to Hsu's BoA accounts. Id. at A5; Gov't C.A. Br. 4-7. Second, petitioner opened a savings account at Washington Mutual Bank in the name of his father, Richard Shaw. When petitioner attempted to link that account to the fraudulent Hsu PayPal account, PayPal flagged the transaction as suspicious and sent a request for more information to the email address that petitioner had created in Hsu's name. Petitioner circumvented Paypal's security procedures and succeeded in linking the accounts by using an altered copy of Hsu's driver's license and a copy of one of Hsu's BoA statements that petitioner altered to make it look like Hsu owned the fake Richard Shaw account. Pet. App. A5-A6; Gov't C.A. Br. 8. Third, petitioner opened a checking account at Washington Mutual in his father's name, which was automatically linked to the fraudulent Richard Shaw savings account. Petitioner also linked that checking account to a Paypal account that petitioner had previously established in his father's name. Pet. App. A6; Gov't C.A. Br. 4-5, 8. Petitioner also had access to a Washington Mutual account that he previously opened in his and Fu's names and to which he linked his own Paypal account. Pet App. A6; Gov't C.A. Br 9 Petitioner took these actions

without the knowledge or permission of Hsu, his father, or Fu. Pet. App. A5-A6.

After petitioner established and linked the accounts, he began to drain the BoA accounts with a series of cascading computer transfers and checks that moved funds from BoA, to PayPal, to the Washington Mutual accounts in his father's name, and ultimately to petitioner's own bank account. Pet. App. A6; Gov't C.A. Br. 9. From June to October 2007, petitioner successfully executed about 38 fraudulent bank transfers and obtained approximately $307,000 from the BoA accounts. Pet. App. A6; Gov't C.A. Br. 10. Petitioner used the funds to pay for, inter alia, his unsuccessful day-trading efforts and motorcycle and car parts. Gov't C.A. Br. 9.

In October 2007, Hsu's son discovered that money was missing from the BoA accounts, reported the fraud to BoA, and closed the accounts. Consistent with standard industry practice, BoA returned approximately $131,000 to Hsu for the fraudulent transactions that occurred within 60 days of his report of the fraud but did not reimburse Hsu for funds that petitioner drained in earlier transactions. PayPal, in turn, reimbursed BoA for the amount that BoA reimbursed to Hsu. As a result, BoA did not ultimately suffer a direct pecuniary loss from petitioner's fraud. Pet. App A6-A7; Gov't C.A. Br. 10-11.

2. A federal grand jury indicted petitioner on 17 counts of bank fraud, in violation of 18 U.S.C. 1344(1). Pet. App. A7. Section 1344 makes it an offense "knowingly [to] execute[], or [to] attempt[] to execute, a scheme or artifice --

> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.

18 U.S.C. 1344. This case concerns only the first clause of that provision, Section 1344(1).

At trial, petitioner argued that the district court should instruct the jury that, to prove bank fraud under Section 1344(1), the government must prove that he intended not only to target a bank for fraud but also that he intended to cause the bank to suffer an actual loss or to expose the bank to a risk of loss. Pet. App. A7. More specifically, petitioner requested instructions requiring that the government prove that his scheme to defraud was "designed to victimize [the bank] by causing [the bank], not only Stanley Hsu, monetary loss," and that petitioner "acted with the specific intent to defraud [the bank]; that is, with the intent to deceive and cheat [the bank] in order to expose [the bank], not only Stanley Hsu, to monetary loss " Id. at A7-A8 (brackets in original).

The district court rejected petitioner's instructional request based on its conclusion that Section 1344(1) does not require proof that a fraudulent scheme expose a bank to a risk of loss or proof of intent to make the bank a financial victim of the fraud. Pet. App. A8. The court instead instructed the jury that, to prove bank fraud under Section 1344(1), the government must prove beyond a reasonable doubt that petitioner (1) "knowingly executed a scheme to defraud a financial institution as to a material matter" (2) "with the intent to defraud the financial institution" and that (3) "the financial institution was insured by the Federal Deposit Insurance Corporation." Id. at A8-A9. The court further instructed that "[a]n intent to defraud is an intent to deceive or cheat" and that "[t]he phrase 'scheme to defraud' means any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, or deprive a financial institution of something of value." Id. at A9. The court clarified to the jury that the government need not prove that "any financial institution lost any money or property as a result of the scheme to defraud." Ibid.

The jury found petitioner guilty on 14 bank-fraud counts Pet App A9 Petitioner appealed.

3. While petitioner's appeal was pending, this Court decided Loughrin v United States, 134 S Ct 2384 (2014), which interpreted the second clause of the bank-fraud statute, Section

1344(2). The Court in Loughrin granted review on the question whether "the Government must prove that the defendant intended to [1] defraud a bank and [2] expose it to risk of loss in every prosecution under 18 U.S.C. § 1344." Pet. at i, Loughrin, supra (No. 13-316). The Court held that neither is required.

First, Loughrin observed that Section 1344(1) requires proof that "a defendant intend[ed] to 'defraud a financial institution,'" 134 S. Ct. at 2389-2390, but Section 1344(2) does not, id. at 2390-2395. Rather than read Section 1344(2) to incorporate an element textually limited to the first clause of Section 1344, the Court interpreted Section 1344(2) to require proof of a scheme (1) to obtain property owned by, or under the custody or control of, a bank (2) by means of false or fraudulent pretenses, representations, or promises, which requires proof of a scheme in which the "defendant's false statement is the mechanism naturally inducing a bank (or custodian) to part with its money." Id. at 2389, 2394. Under that reading, the Court recognized, "the overlap between the two clauses [of Section 1344] is substantial." Id. at 2390 n.4. Nevertheless, the Court explained, Section 1344(1) retains independent meaning because it covers not only schemes involving the use of falsehoods like Section 1344(2) but also check-kiting schemes that "do not involve any false representations." Ibid.

Second, Loughrin held that Section 1344(2) does not require proof that the fraudulent scheme placed a bank at a risk of loss. 134 S. Ct. at 2395 n.9. The Court reasoned that "nothing like that element appears in the clause's text." Ibid. Moreover, the Court explained, a risk-of-loss element "fits poorly" with the Court's holding in Neder v. United States, 527 U.S. 1, 25 (1999), that "the gravamen of § 1344 is the 'scheme,' rather than the 'completed fraud.'" 134 S. Ct. at 2395 n.9 (quoting Neder, 527 U.S. at 25). That focus on the defendant's "scheme" rather than a completed fraud means that a Section 1344 offense requires neither "damage" nor any "reliance" by a victim on the defendant's fraudulent misrepresentation. Ibid. (quoting Neder, 527 U.S. at 25); see id. at 2393-2394.

4. The court of appeals subsequently affirmed in this case. Pet. App. A1-A15. The court upheld the jury instructions, holding that Section 1344(1) does not require proof that a defendant "intended the bank to bear the loss" from his fraudulent scheme, id. at 4. See id. at 10-15.

The court of appeals observed that Loughrin had recently concluded that although Section 1344(1) and Section 1344(2) govern distinct types of bank fraud, the provisions "overlap substantially " Pet. App. A10 Among other things, the court observed, Loughrin held that Section 1344(2) does not require proof of "a risk of loss to a bank " Id. at A11.

The court of appeals reached a similar conclusion under Section 1344(1). The court explained that the "statutory language" was inconsistent with petitioner's view that Section 1344(1) requires proof that the defendant "intended to expose the bank to the principal risk of loss." Pet. App. A11-A12. "[N]either [Section 1344(1) nor Section 1344(2)] * * * refers to monetary loss or to the risk of such loss." Id. at A11. Section 1344(1)'s text, the court explained, instead "focuses on the intended victim of the deception" (a bank) and, for that reason, it applies to schemes "to deceive the bank" and "covers schemes to deceive the bank directly." Id. at A11-A12. Thus, "[n]either clause [of Section 1344] requires the government to establish the defendant intended the bank to suffer a financial loss." Id. at A12.

The court of appeals explained that its prior bank-fraud precedent reached "the same result" and that Loughrin now further supports the conclusion that neither Section 1344(1) nor Section 1344(2) turns on "which entity the defendant intended to bear the financial loss" of his scheme. Pet. App. A12-A13. Loughrin, the court explained, interpreted Section 1344(2)'s language as designed to avoid "'entangling courts in technical issues of banking law about whether the [bank], or, alternatively, a depositor would suffer the loss from a successful fraud '" Id. at A14 "There is no reason to believe Congress

wanted courts to become more entangled in such technical issues under [Section 1344(1)] than under [Section 1344(2)]." Ibid.

The court of appeals noted that decisions by other courts of appeals before Loughrin reflected a "circuit split" (Pet. App. A13) over whether "risk of financial loss to the bank is an element that must be proven under [Section] 1344(1)." Id. at A14; see id. at A4. Those courts that previously required such an offense element, the court explained, based their view on "legislative history" suggesting that Section 1344 would advance the "'federal interest in protecting the financial integrity'" of federally insured banks. Id. at A14-A15 (citation omitted). "But requiring proof of intent that a bank bear a risk of loss does not serve this end": "Few criminals have any knowledge of the rules of law that govern which entity bears the risk of loss," and the identity of the person ultimately bearing that risk depends upon "the operation of banking laws," not the identity of the person "that the defendant intends to harm." Id. at A15. The court accordingly concluded that, consistent with Loughrin, it would not "read an additional element into [Section] 1344(1) that Congress did not include; that does not serve the Congressional purpose; and that could needlessly entangle judges and juries in the intricacies of banking law " Ibid.

ARGUMENT

Petitioner argues (Pet. 21-24) that the court of appeals erred in rejecting his contention that Section 1344(1) requires proof that the defendant intended the defrauded bank to suffer a financial loss. Petitioner further argues (Pet. 10-21) that this Court's intervention is necessary to resolve a division of authority on that question. This Court's review is unwarranted at this time. The court of appeals correctly interpreted Section 1344(1), and it is the only court of appeals to have addressed the question presented after Loughrin v. United States, 134 S. Ct. 2384 (2014). Review would be premature before other courts of appeals have had an appropriate opportunity to consider Section 1344(1) in light of this Court's analysis of the bank-fraud statute in Loughrin.

1. The court of appeals correctly rejected petitioner's contention that Section 1344(1) requires proof of "intent to financially victimize the bank." Pet. App. A4. Section 1344(1) makes it an offense "knowingly [to] execute[], or [to] attempt[] to execute, a scheme or artifice -- (1) to defraud a financial institution." 18 U S.C. 1344 A scheme to defraud a bank, in turn, requires proof of an intent to deprive the bank of something of value by deception; it does not require proof that a defendant intended to cause financial harm to the bank.

a. This Court has concluded that the term to "defraud" in the mail-, wire-, and bank-fraud contexts borrows meaning from the common law. Neder v. United States, 527 U.S. 1, 22 (1999). At common law, the term "refer[s] 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching.'" McNally v. United States, 483 U.S. 350, 358 (1987) (citation omitted). Such fraud at common law requires proof only of an "intention to induce the plaintiff to act or refrain from action in reliance upon the misrepresentation." William P. Keeton et al., Prosser and Keeton on the Law of Torts § 105, at 728 (5th ed. 1984); see Restatement (Second) of Torts § 525 (1976) ("One who fraudulently makes a representation * * * for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit.") "[C]ommon-law fraud has no additional 'intent to harm' requirement." United States v. Kenrick, 221 F.3d 19, 28 (1st Cir.) (en banc), cert. denied, 531 U.S 961 and 531 U.S. 1042 (2000), abrogated in part on other grounds by Loughrin, 134 S. Ct. at 2388 n.2. Thus, the words "scheme or artifice to defraud" in Section 1344(1) do not suggest a requirement of intent to cause financial harm to the victim.

That conclusion is supported by this Court's holding that the mail- and wire-fraud statutes -- which, like Section

1344(1), prohibit certain "scheme[s] or artifice[s] to defraud," 18 U.S.C. 1341, 1343 -- cover "any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." Carpenter v. United States, 484 U.S. 19, 27 (1987). In Carpenter, for instance, the Court held that Sections 1341 and 1343 apply even if the fraudulent scheme -- when wholly successful -- wrongfully acquires intangible property whose theft would cause no "monetary loss" to the victim. Id. at 26 (holding that a deprivation of a right to "exclusive use" of confidential information is sufficient). Congress directly modeled Section 1344 on the mail- and wire-fraud statutes because it understood them "to reach a wide range of fraudulent activity." S. Rep. No. 225, 98th Cong., 1st Sess. 378 (1983) It follows that Section 1344(1) likewise requires no proof of intent to cause a victim bank financial harm.

Section 1344(1)'s drafting history demonstrates that Congress rejected language that would have required proof of intent to harm a bank After the Senate passed the Comprehensive Crime Control Act bill (S. 1762, 98th Cong.) containing the text ultimately enacted as Section 1344, see 130 Cong. Rec. 1587, 1636-1637 (1984); S. Rep. No. 225, at 377-379, 772; cf. 18 U.S C. 1344 (1988), a House subcommittee hearing addressed the relevant portions of S. 1762 and a competing House measure (H.R 5405). Financial Bribery and Fraud: Hearing Before the Subcomm.

on Crim. Justice of the House Comm. on the Judiciary, 98th Cong., 2d Sess. (1984). The House bill was narrower than its Senate counterpart, defining a Section 1344 offense as knowingly "devis[ing] a plan to obtain the property of a national credit institution, or to cause economic loss to such an institution by fraudulent means." Id. at 19 (emphasis added). The Justice Department "strongly urge[d]" the subcommittee "to follow the format in * * * S. 1762" because, the Department explained, Section 1344 should be given "broader coverage" and the Senate text was "modeled on the present mail and wire fraud statutes deliberately to incorporate [the] existing case law," which did not limit the offenses to "situations where the object of the fraud is to obtain money or inflict an economic loss." Id. at 4, 12. The House bill was later reported as a clean bill (H.R. 5872) with revisions to "address[] some of the Justice Department's concerns" by adopting S. 1762's language so as "to incorporate case law" giving "expansive interpretations" to the mail- and wire-fraud statutes H.R. Rep. No. 901, 98th Cong., 2d Sess. 3-4 (1984). In doing so, Congress rejected the very requirement that petitioner now advocates: a requirement that the scheme be intended to cause financial harm to a bank.

Such a requirement would also serve no evident legislative goal. Petitioner's intent-to-harm requirement would draw a distinction between identical fraudulent schemes targeting bank

property based on whether the defendant was merely indifferent to whether the bank would itself bear the loss or whether the loss would ultimately be covered by insurance or other entities. But the capacity of such fraudulent schemes to undermine the banking system does not turn on whether the financial loss is ultimately borne by a particular deceived bank or by some other entity affected by the relevant banking transaction -- a question that may turn on "technical issues of banking law." Loughrin, 134 S Ct. at 2395 n.9. Petitioner thus identifies no sound reason why Congress would have wanted to prohibit only fraudulent schemes targeting banks by schemers who affirmatively "intend[] to expose the bank to actual or potential loss," Pet. 23.

This Court's recent decision in Loughrin supports the reasoning of the court of appeals. The Court in Loughrin granted certiorari on the question whether the government must prove that the defendant "intended to [1] defraud a bank and [2] expose it to risk of loss in every prosecution under 18 U S.C. § 1344," Pet at i, Loughrin, supra (No. 13-316) (emphasis added), and held that Section 1344(2) does not include a risk-of-loss element, 134 S. Ct. at 2395 n.9. The rationale for that holding applies equally here.

First, "nothing like that [asserted] element appears in the [statutory] text " Loughrin, 134 S Ct at 2395 n.9. As the

court of appeals explained, "[t]he language of neither clause of [Section 1344]" supports petitioner's view that "the defendant [must have] intended the bank to suffer a financial loss." Pet. App. A11-A12 Loughrin also concluded that a risk-of-harm-to-a-bank element would be a poor fit for Section 1344 because it reaches the scheme, not the consummated fraud, 134 S. Ct. at 2395 n.9, yet petitioner's "inten[t] to expose the bank to actual or potential loss" element (Pet. 23) is even worse. Petitioner emphasizes (Pet. 23) that his "position is not that [Section] 1344(1) requires proof of 'risk of loss,' * * * but rather proof that the defendant intended to expose the bank to actual or potential loss." But Congress would have had no reason to limit the bank-fraud statute in that manner, since the harms from the scheme do not depend on the fraudster's anti-bank purpose (as opposed to his indifference to a possible bank loss). See pp. 14-15, supra. Loughrin's conclusion that the text of Section 1344(2) "appears calculated to avoid entangling courts in technical issues of banking law about [who] would suffer the loss from a successful fraud," 134 S. Ct. at 2395 n.9, applies equally here: Congress used no language that suggests that it intended to base liability for a fraudulent scheme on a defendant's understanding or belief about who would ultimately bear the financial loss from that scheme. See Pet App. A14.

b. Petitioner briefly argues (Pet. 21-22) that the word "defraud" as construed in McNally supports his intent-to-harm-a-bank requirement. But as explained above (pp. 12-13, supra), that common-law term provides no basis for that requirement.

Petitioner contends that rejecting his intent-to-harm-a-bank requirement for Section 1344(1) "virtually dissolves the distinction" between Section 1344(1) and Section 1344(2) because the latter already covers schemes when "'a defendant makes a misrepresentation to the bank itself.'" Pet. 22 (quoting Loughrin, 134 S. Ct. at 2393). Petitioner recognizes the "'substantial overlap'" of the two provisions, but argues that omitting his intent element "effectively" renders one of the clauses superfluous. Ibid. (quoting Loughrin, 134 S. Ct. at 2390 n.4). That too is incorrect. Section 1344(1) covers "check kiting" schemes while Section 1344(2) does not. Loughrin, 134 S. Ct. at 2390 n.4. Section 1344(2), in turn, is broader in some respects than Section 1344(1) because it covers schemes targeting either (1) bank-owned property directly held by the bank or in the custody or control of others and (2) property not owned by a bank but under its custody or control, 18 U.S.C. 1344(2), when the scheme's "false statement is the mechanism naturally inducing a bank (or custodian) to part with its money" or other property, Loughrin, 134 S Ct. at 2394. Both provisions thus

retain independent meaning even though they have "substantial" overlap in practice, id. at 2390 n.4.

Finally, petitioner argues (Pet. 23-24) that his focus on the defendant's intent to harm a bank would not entangle courts in "technical issues of banking law" because the bank's actual risk of loss is irrelevant. Petitioner illustrates his point by arguing (Pet. 23) that the jury could infer intent, for instance, when evidence shows that a bank was "obligated to pay a cashier's check written on non-sufficient funds." Such evidence not only directly implicates "technical issues of banking law," it does so through the even less sensible lens of a criminal defendant's inferred knowledge of such law. See pp. 14-16, supra.

2. Petitioner contends (Pet. 11-19) that review is warranted because, he asserts, the court of appeals' decision conflicts with decisions from nine other courts of appeals. Although some of decisions on which petitioner relies are distinguishable and do not support petitioner's asserted extent of the division of authority, the government acknowledges that some courts of appeals before Loughrin agreed with petitioner's view that Section 1344(1) requires proof of intent to harm a bank. See, e.g., United States v. Nkansah, 699 F 3d 743, 748 (2d Cir. 2012) (concluding that Section 1344 requires "intent to victimize the [banking] institution by exposing it to actual or poten-

tial loss") (citation omitted), abrogated in part by Loughrin, supra (rejecting risk-of-loss element under Section 1344(2)); United States v. Thomas, 315 F.3d 190, 200 (3d Cir. 2002) (concluding that "harm or loss to the bank must be contemplated by the wrongdoer" because "the bank must be deliberately harmed before [Section 1344(1)] is violated"), abrogated in part by Loughrin, 134 S. Ct. at 2388 n.2 (rejecting parallel holding for Section 1344(2)).

This Court's review is nevertheless unwarranted at this time. Other than the opinion in this case, petitioner cites no opinion decided after Loughrin. Indeed, no court of appeals other than the court here has yet to consider after Loughrin whether Section 1344(1) requires intent to harm a bank.* Petitioner argues (Pet. 26) that "the question presented here will repeat, and the existing conflict will endure." Perhaps that will be so; perhaps not. But if a significant division of authority exists after the courts of appeals have had an

---

* After Loughrin, the Second Circuit issued an unpublished summary order in United States v. Reese, 603 Fed. Appx. 63, cert. denied, 136 S. Ct. 433 (2015), holding that evidence that Reese "trafficked in stolen checks and the forged checks were presented to the drawee bank" was sufficient under Section 1344(1) to show that he "intended to victimize the bank by exposing it to an actual or potential loss " Id. at 64 (citation omitted) Because the evidence was sufficient under its pre-Loughrin precedents, Reese had no occasion to consider whether to disavow its pre-Loughrin intent-to-harm requirement

opportunity to consider the issue in light of Loughrin, this Court will have the opportunity to decide whether review is warranted at that time. If not, review would not be warranted either now or in the future.

Moreover, even if the courts of appeals remain divided over whether Section 1344(1) includes an intent-to-harm-the-bank requirement after having considered the issue in light of Loughrin, such a division may not reflect a significant one warranting this Court's review. Loughrin recognizes that, given the Court's interpretation of Section 1344(2), "the overlap between [Section 1344(1) and Section 1344(2)] is substantial." 134 S. Ct. at 2390 n.4. For instance, because petitioner's scheme targeted bank funds and involved fraudulent representations communicated to banks, petitioner's scheme could now be charged under Section 1344(2) as interpreted by Loughrin. The substantial overlap of the two provisions therefore may mean that any resulting future disagreement about the scope of Section 1344(1) could be of limited, or no, practical import. Cf. United States v. Bah, 587 Fed. Appx. 752, 754-755 (4th Cir. 2014) (unpublished) (affirming bank-fraud conviction based on guilty plea because the defendant was charged under both Section 1344(1) and Section 1344(2), and the conviction was valid in light of Loughrin under Section 1344(2)). As such, review is not warranted at this time

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2016

No. 15-5991

IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE EUGENE SHAW, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, via e-mail and first-class mail, postage prepaid, this 8th day of March, 2016.

[See Attached Service List]

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March 8, 2016

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Case Management Supervisor, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

15-5991
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IN THE

Supreme Court of the United States

LAWRENCE EUGENE SHAW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government acknowledges that the Circuits are divided over whether 18 U.S.C. §1344(1) requires proof of intent to harm a bank. BIO 18-19. It agrees that a "significant" split may endure, and that review may be warranted in the future. See id. at 19-20. And it never denies that this case is a good vehicle to resolve the conflict. Instead, the United States spends the bulk of its brief arguing that the Ninth Circuit construed §1344(1) correctly. See BIO 11-17. That claim, even if true, would not diminish the need for review where the Ninth Circuit's minority-view decision only accentuated a split in the Courts of Appeals -- now three-to-nine -- on an issue of substantial practical importance.

But the Ninth Circuit's construction of §1344(1) to require proof of an intent to deceive, but not to harm, a bank is also wrong. As this Court has underscored, the dual hallmarks of fraud are deception and harm -- "wronging one in his property rights by dishonest methods or schemes." See McNally v. United States, 483 U.S. 350, 358 (1987). Consistent with this precedent, and as nine courts -- the First, Second, Third, Fourth, Fifth, Seventh, Tenth, Eleventh and D.C. Circuits -- have held, contrary to the Ninth Circuit's decision below, §1344(1)'s "scheme to defraud" requires proof of an intent to deceive and cheat a bank.

Nor is the government's position that review is "premature" in light of this Court's analysis of the bank-fraud statute in Loughrin v. United States, 134 S.Ct. 2384 (2014), BIO 11, more availing. The government depicts Loughrin as a decision that construed "the bank-fraud statute" as a whole, and on this basis, posits that the Courts of Appeals should be given "an appropriate opportunity" to reconsider

their binding §1344(1) Circuit precedent in its wake. BIO 11, 19-20. That position is at odds with Loughrin itself, which was tethered expressly to §1344(2), and characterized the lower court's §1344(1) analysis as "not material" to the question presented for the Court's determination. See Loughrin, 134 S.Ct at 2388. Because Loughrin's holding extends to §1344(2) only, the Circuits will have no basis, and thus no "appropriate opportunity," to reconsider their binding §1344(1) Circuit precedent, as the unpublished decision of the only other court to consider §1344(1) post-Loughrin makes clear. See United States v. Reese, 603 Fed. Appx. 63, 64 (2d Cir. 2015) (non-precedential summary order reading Loughrin to apply to §1344(2) only, and reasserting pre-Loughrin §1344(1) precedent requiring an intent to harm a bank). The government does not even offer a theory about how Loughrin provides an "appropriate opportunity," under governing standards in the Circuits, for courts to reconsider their §1344(1) precedent, thus implicitly conceding that the entrenched conflict is likely to endure, absent a decision from this Court.

Finally, the government's fleeting suggestion that the overlap between §1344(1) and §1344(2) "may" diminish the practical import of future conflict over §1344(1) is undercut by its own brief. BIO 20. The government acknowledges that, post-Loughrin, petitioner Shaw's scheme could be charged under §1344(2) -- but only because it (1) targeted bank funds and (2) involved fraudulent representations communicated to banks. See id. By extension, if Shaw's scheme had not involved false representations, it could only be charged under §1344(1), at best. Thus, Loughrin's holding -- that each clause is intended to have "separate meanings," and

that §1344(2) "demands that the defendant's false statement is the mechanism naturally inducing a bank. .to part with its money," Loughrin, 134 S.Ct. at 2391-94 (emphasis added) -- ensures that the government will continue to charge bank fraud offenses under §1344(1), not just §1344(2). Indeed, as this Court noted, id. at 2390 n.4, and as the government acknowledges, BIO 17, "check-kiting" is one example of a scheme that can be charged under §1344(1), only, post-Loughrin. Fraudulent schemes that deceive banks through the omission or concealment of material facts are others. As such, the question whether §1344(1)'s "separate meaning" requires the government to present evidence of any further intent to harm a bank has only gained, not lost, importance after Loughrin.

I. Review Is Warranted Because The Ninth Circuit's Minority-View Decision Accentuated The Circuit Split, Now Three-to-Nine, On Section 1344(1)'s Intent Requirement

One of the principal purposes of this Court's certiorari jurisdiction is to bring about uniformity where the decision of a federal court of appeals, as to which review is sought, is in direct conflict with a decision of another court of appeals on the same matter of federal law See Supreme Court Rule 10(a) (July 1, 2013); see also Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 340 (2005) (certiorari granted in securities fraud case "[b]ecause the Ninth Circuit's views about loss causation differ from those of other Circuits that have considered this issue").

The government acknowledges that the Ninth Circuit's decision here conflicts with that of other Courts of Appeals, which have held that §1344(1) requires proof of intent to harm a bank. BIO 18. By way of example, the government cites the Second Circuit's decision in United States v. Nkansah, 699 F.3d 743 (2d Cir. 2012),

and the Third Circuit's decision in United States v. Thomas, 315 F.3d 190 (3d Cir. 2002), and further acknowledges that each was abrogated by Loughrin as to §1344(2), only, but remains Circuit law as to §1344(1). See BIO 18.

The government is correct that these cases are directly contrary to the decision of the Ninth Circuit in this case. Cf. United States v. Shaw, 781 F.3d 1130, 1135 (9th Cir. 2015) ("The statutory language focuses on the intended victim of the deception, not the intended bearer of the loss. Section 1344(1) requires the intent to deceive the bank. Section 1344(2) requires false or fraudulent representations or pretenses to third parties.") with Nkansah, 699 F.3d at 748 ("convictions for bank fraud are limited to situations where 'the defendant (1) engaged in a course of conduct designed to deceive a federally chartered or insured financial institution into releasing property; and (2) possessed an intent to victimize the institution by exposing it to actual or potential loss'") (citation omitted); Thomas, 315 F.3d at 200 (holding that "harm or loss to the bank must be contemplated by the wrongdoer to make out a crime of bank fraud"); id. at 202 ("[e]ven a scheme which does expose a bank to a loss must be so intended") (emphasis added). Given the enduring importance of this issue, addressed below, this conflict, standing alone, would be enough to warrant the Court's review under the well-established ground reflected in Supreme Court Rule 10(a).

But, as these decisions acknowledged, and as other courts too have recognized, the split is even more pervasive. See Shaw, 781 F.3d at 1132 ("the circuits are divided as to the requirements of § 1344(1)"); Thomas, 315 F.3d at 196

("The Courts of Appeals are not of one mind as to the proper reading of the statute, including. .the intent requirement[.]"); Nkansah, 699 F.3d at 762 (Lynch, J., concurring) ("Although § 1344 has produced much litigation in the Circuits and many separate opinions by learned appellate judges, federal courts do not agree on the mental state necessary to support a conviction under §1344, nor on the relationship between the statute's two subsections."); United States v. Staples, 435 F.3d 860, 866-867 (8th Cir. 2006) (noting the circuit split as to whether the bank-fraud statute extends to situations where the defendant has no intent to expose the bank to an actual or potential loss); United States v. Everett, 270 F.3d 986, 990 (6th Cir. 2001) ("The Circuits are not in accord as to the intent required to violate §1344."); United States v. Kenrick, 221 F.3d 19, 27 (1st Cir. 2000) (en banc) ("There is also no consensus among the circuits on the issue.").

That is because, in addition to the Second and Third Circuits, seven other courts -- the First, Fourth, Fifth, Seventh, Tenth, Eleventh and D.C. Circuits -- have agreed that §1344(1) requires proof of an intent to harm a bank. See Pet. 13-19 (discussing each Circuit's precedent). In particular, in a case closely analogous to Shaw, the Fifth Circuit held that §1344(a)(1) (now §1344(1)) did not apply to a scheme that, like petitioner's, was designed to take a third party's money from his bank account because "the government does not argue that [appellant] attempted to obtain funds belonging to the banks, but only that she attempted to obtain funds under the custody and control of the bank" -- "a violation of subsection (a)(2), not (a)(1)." United States v. Briggs, 939 F.2d 222, 225 (5th Cir. 1991). And two courts

- the Sixth and the Eighth Circuits -- are in accord with the Ninth Circuit's view. See Pet. 20-21.

The division in the courts of appeals is thus undeniably clear. Although the government makes the unsubstantiated claim that "some" of the decisions discussed in the petition do not support the "asserted extent of the division of authority," BIO 18, it concedes that the existing split is "significant," that it may continue post-Loughrin, and that review may be warranted in the future. See id. at 19-20. Because the conflict in the Circuits is plain and irreconcilable, and because this case is an excellent vehicle to resolve the conflict -- a fact the government does not challenge -- the Court should grant the writ.

II. The Ninth Circuit's Minority-View Decision Is Wrong

In this context, where every court has opined on the question presented and Shaw only accentuated the divide, now 3-to-9, review would be warranted even if the Ninth Circuit's construction of §1344(1) were correct. But, contrary to the government's claim, see BIO 11-18, it is not.

In Shaw, the Ninth Circuit held that the only mens rea required by §1344(1) is an "intent to deceive the bank" -- not proof of a further intent to "cheat," "harm," or otherwise "victimize" a bank, however that additional requirement is formulated. See Shaw, 781 F.3d at 1135. In this respect, Shaw is contrary not only to precedent in nine other Circuits, but to this Court's jurisprudence too, which underscores that the essence of traditional fraud is the intent to cheat another via deception. In McNally, for example, the Court held that, at common law, the term "to defraud"

"refer[s] to wronging one in his property rights by dishonest methods or schemes," and "usually signifies] the deprivation of something of value by trick, deceit, chicane or overreaching.'" 483 U.S. at 358 (emphasis added) (citation omitted). In Carpenter v. United States, 484 U.S. 19 (1987), likewise, the Court held that "scheme or artifice to defraud" means "any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations or promises." Id. at 27 (emphasis added). And, more recently, in Skilling v. United States, 561 U.S. 358 (2010), the Court emphasized that traditional fraud involves "the victim's loss of money or property." Id. at 400 (emphasis added). The Ninth Circuit's construction of §1344(1) to require no more than an intent to deceive a bank -- that is, no additional proof of an intent to harm a bank (or any third party, for that matter) -- cannot be reconciled with this Court's pronouncements about the dual hallmarks of fraud. Rather, it is petitioner's construction of §1344(1) to require proof of an intent to deceive and cheat a bank that is consistent with this precedent.

Although the government acknowledges McNally and Carpenter, BIO 12-13, it attempts to paint the Court's pronouncements as inconsistent with petitioner's construction of §1344(1). Specifically, the government reduces Shaw's position to a requirement of intent to cause "financial harm" to a bank, and asserts that the problem with this construction is that it fails to cover the intentional deprivation of intangible property rights. BIO 13. That argument does not make petitioner's position wrong because the requirement of intent to deceive and cheat is broad enough to cover schemes that target banks' property rights, both traditional and

intangible. Nor does it make the Ninth Circuit's decision correct.

Indeed, assuming arguendo §1344(1) includes schemes that target a bank's intangible property rights, the Ninth Circuit's decision remains equally incorrect: Shaw held that proof of an intent to deceive a bank, alone, was sufficient. See Shaw, 781 F.3d at 1135 ("Section 1344(1) requires the intent to deceive the bank" only). This leaves no room for the requirement of any further intent to cheat the bank consistent with McNally, Carpenter, and Skilling, whether "cheat" is broadly construed to mean traditional and intangible property rights, or more narrowly interpreted to mean traditional property rights only.

For the same reasons, nor does the legislative history cited by the government, BIO 13-14, make petitioner's construction wrong -- or the Ninth Circuit's construction right. As a preliminary matter, the legislative history for §1344 suggests that Congress did not originally intend for "schemes to defraud" to cover those that targeted intangible property rights, but may have come to accept the judicial expansion of the phrase by the time §1344 was enacted. See H.R. Rep. No. 901, 98th Cong., 2d Sess. 4 (1984) ("The [bank-fraud] section thus parallels the language of the current mail fraud and wire fraud statute ("scheme to defraud"), and is intended to incorporate case law interpretations. The Committee, however, is concerned by the history of expansive interpretations of that language by the courts. The current scope of the wire and mail fraud offenses is clearly greater than that intended by Congress. Although the Committee endorses the current interpretations of the language, it does not anticipate any further expansions.")

(emphasis added); see also Skilling, 561 U.S. at 400 (beginning in 1941, "the Courts of Appeals, one after the other, interpreted the term 'scheme or artifice to defraud' to include deprivations not only of money or property, but also of intangible rights").

But what the same legislative history for §1344 cited by the government, BIO 13, makes clear is that Congress was concerned with schemes designed to victimize banks' property rights by fraud (however broadly property rights had come to be understood). See S.R. Rep. No. 225, 98th Cong., 1st Sess. 377 (1983) ("T]here is a strong Federal interest in protecting the financial integrity of these institutions, and the legislation in this part would ensure a basis for Federal prosecution of those who victimize these banks through fraudulent schemes.") (emphasis added); id. at 378 ("in the proposed offense, jurisdiction is based on the fact that the victim of the offense is a federally controlled or insured institution") (emphasis added). The Ninth Circuit's construction of §1344(1) to require proof of an intent to deceive a bank, only, is at odds with Congress's concern for schemes designed to victimize banks. Conversely, petitioner's construction of §1344(1) to require proof of an intent to deceive and cheat a bank is consistent with this history.

III. Loughrin Does Not Enable the Courts to Reconsider Binding §1344(1) Circuit Precedent

The government's position that review is "premature" in light of this Court's analysis of the bank-fraud statute in Loughrin, BIO 11, is also unavailing. Loughrin did not construe "the bank-fraud statute," cf. BIO 11, but instead §1344(2), only. See Loughrin, 134 S.Ct at 2387 ("The question presented is whether

the Government must prove that a defendant charged with violating that provision [§1344(2)] intended to defraud a bank.") (emphasis added). And Loughrin expressly characterized the lower court's §1344(1) analysis as "not material" to the question presented for the Court's determination. See id. Because Loughrin did not address what the "intent to defraud a financial institution" means for §1344(1) but held that the two sub-sections are legally distinct and that such proof is not required for §1344(2), id. at 2389-90, Loughrin will provide no "appropriate opportunity" for the Circuits to reconsider their binding precedent about §1344(1). Cf. BIO 11, 19-20.

Courts are typically bound by prior decisions of the Circuit unless and until the precedents established therein are reversed by this Court or en banc. The latter is "not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. Proc. 35(a). Some courts have carved out an exception to this rule, however, allowing precedent to be reconsidered without convening an en banc panel where an intervening decision of this Court is in conflict with, even if it does not expressly overrule, prior circuit authority.

As discussed above, the government identifies the Second and Third Circuits as examples of courts that are in direct conflict with the Ninth Circuit's construction of §1344(1) here. BIO 18. But the standard in these Circuits will not allow the precedent the government acknowledges to be contrary to Shaw -- the Second

Circuit's decision in Nkansah, and the Third Circuit's decision in Thomas, see id. -- to be reconsidered in light of Loughrin.

In the Second Circuit, the court may reconsider Nkansah only if Loughrin creates "a conflict, incompatibility, or inconsisten[cy]" between Circuit §1344(1) precedent and the Court's intervening decision. See In re Arab Bank, PLC Alien Tort Statute Litigation, 808 F.3d 144, 155 (2d Cir. 2015) (citation omitted). And in the Third Circuit, the court may reconsider Thomas only if Loughrin is found to be "patently inconsistent" with Circuit authority, see Cox v. Dravo Corp., 517 F.2d 620, 627 (3d Cir.1975), or "in conflict" with it, see Mennen Co. v. Atl. Mut. Ins. Co., 147 F.3d 287, 294 n. 9 (3d Cir.1998). While the Ninth Circuit's standard is similar, other courts whose precedent conflicts with Shaw have an even more stringent carve-out. Cf. Miller v. Gammie, 335 F.3d 889, 899 (9th Cir. 2003) (where the reasoning or theory of prior circuit authority is "clearly irreconcilable" with intervening higher authority, the prior circuit opinion is effectively overruled) with Chisolm v. TranSouth Fin. Corp., 95 F.3d 331, 337 n.7 (4th Cir.1996) (permitting three-judge panels to overrule a prior panel upon the basis of a superseding decision of the Supreme Court); White v. Estelle, 720 F.2d 415, 417 (5th Cir.1983) (same, upon "intervening and overriding Supreme Court decisions"); Dawson v. Scott, 50 F.3d 884, 892 n. 20 (11th Cir.1995) (same, upon a "directly applicable" intervening Supreme Court decision).

The government fails to articulate any theory under which either court would have an "appropriate opportunity" to reconsider the precedent it acknowledges

directly conflicts with Shaw. That is because no such theory exists. Nothing in Loughrin comes even close to a "conflict" or "patent[] inconsisten[cy]" with the Third Circuit's decision in Thomas as to §1344(1). See Cox, 517 F.2d at 627; Mennen Co., 147 F.3d at 294 n.9. Likewise, Loughrin contains nothing approaching "a conflict, incompatibility, or inconsisten[cy]" with the Second Circuit's Nkansah's holding as to §1344(1). See In re Arab Bank, PLC Alien Tort Statute Litigation, 808 F.3d at 155.

It is clear that the Second Circuit agrees. In Reese, 603 Fed. Appx. at 64, the court opted for a non-precedential summary order, rather than a published opinion, to review a challenge to appellant's §1344(1) conviction post-Loughrin. Therein, the court read Loughrin as impacting §1344(2) only. See id. ("the Supreme Court held that specific intent to defraud a financial institution was not an element of §1344(2)"). It then reasserted its pre-Loughrin §1344(1) precedent, citing, inter alia, to Nkansah. Id. ("[t]he defendant need only have intended to victimize the bank by exposing it to an actual or potential loss"). Although the government attempts to dismiss the Second Circuit's choice to resolve this matter in a non-precedential summary order that reasserts pre-Loughrin §1344(1) jurisprudence as a function of its finding of sufficiency-of-the-evidence, cf. BIO 19 n.*, the summary order makes clear -- both in its unpublished form and in its substance -- the court's belief that its §1344(1) precedent was unaffected by Loughrin, and thus endures as the standard by which the sufficiency of the evidence to support the §1344(1) conviction was to be assessed.

IV. Post-Loughrin, Whether §1344(1) Requires Proof Of An Intent To Cheat, Not Only Deceive, A Bank Is A Question Of Enduring Practical Importance

At the heart of Loughrin is its construction of §1344(2) to have a "separate meaning[]" from §1344(1): Whereas §1344(2) "demands that the defendant's false statement is the mechanism naturally inducing a bank (or custodian) to part with its money," it is "the first clause of §1344" that "includes the requirement that a defendant intend to 'defraud a financial institution.'" Loughrin, 134 S.Ct at 2389-91, 2393. Thus, "to read clause (1) as fully encompassing clause (2)" -- or vice versa -- "contravenes two related interpretive canons: that different language signals different meaning, and that no part of a statute should be superfluous." Id. at 2388-90.

The government acknowledges the distinction between §1344(1) and §1344(2), but nonetheless posits that the overlap between the provisions "may" diminish the practical import of future conflict over §1344(1). BIO 18, 20. Not so. Now that the Court has held that §1344(1) and §1344(2) are legally distinct, and has further defined §1344(2), the question posed by Shaw's petition as to §1344(1) remains, and calls out even more strongly for resolution.

That this question has enduring significance post-Loughrin finds additional support in Loughrin itself. There, this Court underscored that "Clause (2)" does not, following its construction, "emerge so broad as to wholly swallow Clause (1)," and gave check-kiting as but one example of a scheme that can be prosecuted under §1344(1) but not §1344(2):

> The Courts of Appeals, for example, have unanimously agreed that the Government can prosecute check-kiting (i.e., writing checks against an account with insufficient funds in a way designed to keep them from bouncing) only under Clause (1), because such schemes do not involve any false representations.

Loughrin, 134 S.Ct at 2390 n.4 (emphasis added). The same would be true of any other fraudulent scheme that deceives a bank via the concealment or omission of material facts.

The government recognizes the enduring role §1344(1) will play in check-kiting cases. BIO 18. It also acknowledges that petitioner's scheme could have been charged under §1344(2) -- but only because it (1) targeted bank funds and (2) involved fraudulent representations communicated to banks. BIO 20. Conversely, absent false representations, petitioner's scheme could not be charged under §1344(2). This in turn begs the question whether Shaw's conduct, in this scenario, would fall under §1344(1) instead -- the answer to which depends on §1344(1)'s reach, given the undisputed lack of evidence of Shaw's intent to cheat a bank.

Thus, post-Loughrin, §1344(1) will continue to play a significant role as a stand-alone offense -- at the least, where the "false statement" required by §1344(2) is absent. For the same reason, §1344(1) will continue to act as a predicate for other federal offenses, like aggravated identity theft and racketeering, 18 U.S.C. §§1028A, 1961(1). Indeed, the government's targeted use of §1344(1) should be greater now that this Court has clarified the disjunctive construction of a statute that a number of circuit courts had previously construed conjunctively. Defining the precise contours of §1344(1) has, in short, only become more important now that Loughrin

determined §1344(2)'s. Intervention by this Court, at this juncture, is warranted to ensure a uniform application of §1344(1) to defendants across different jurisdictions.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

Dated: March 22, 2016

No. 15-5991

IN THE

Supreme Court of the United States

LAWRENCE EUGENE SHAW,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent

CERTIFICATE OF SERVICE

I, Koren L. Bell, an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), hereby certify pursuant to Sup. Ct. R. 29 that on this 22nd day of March, 2016, a copy of Reply Brief in Support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed, postage-prepaid, to the Solicitor General of the United States, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Room 5614, Washington, DC 20530-0001, counsel for the Respondent.

Respectfully submitted,

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March 22, 2016

Office of the Clerk
Supreme Court of the United States
One First Street, North East
Washington, DC 20543

Re: Lawrence Eugene Shaw v. United States of America
Supreme Court Case No. 15-5991
Court of Appeals No. 13-50136
District Court Case No. CR 12-00862 JFW

Dear Sir/Madam:

Enclosed please find an original and 10 copies of the (1) Reply Brief for the Petitioner in Support of Petition for Writ of Certiorari and (2) Certificate of Service.

Also enclosed is a copy of the cover page of the Reply Brief. For proof of filing, kindly stamp this page and return it to us in the enclosed postage-prepaid envelope.

Respectfully submitted,

Gretchen Eddy, Legal Assistant to
KOREN L. BELL
Deputy Federal Public Defender

:ge
Encl.

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Supreme Court, U.S.
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JUN 27 2016
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No. 15-5991

In The Supreme Court of the United States

LAWRENCE EUGENE SHAW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For A Writ Of Certiorari Filed: September 4, 2015
Certiorari Granted: April 25, 2016

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United States District Court for the Central District of California

United States v. Lawrence Eugene Shaw

Case No. CR-12-00862-JFW

Relevant Docket Entries

Date	Docket Number	Proceedings
09/11/2012	11	INDICTMENT Filed as to Lawrence Eugene Shaw (1-17) count(s) 1. Offense occurred in LA. (mhe) Modified on 9/18/2012 (sr). (Entered: 09/12/2012)
12/06/2012	70	PROPOSED JURY INSTRUCTIONS filed by Defendant Lawrence Eugene Shaw (Bell, Koren) (Entered: 12/06/2012)
12/06/2012	71	PROPOSED JURY INSTRUCTIONS (Joint Memorandum re Disputed Instructions set) filed by Defendant Lawrence Eugene Shaw (Bell, Koren) (Entered: 12/06/2012)
12/11/2012	80	GOVERNMENT'S OPPOSITION TO DEFENDANT'S PROPOSED JURY INSTRUCTIONS FOR BANK FRAUD filed by Plaintiff USA as to Defendant Lawrence Eugene Shaw Re: Notice of Manual Filing (G-92) 61 (Wilkison, Tracy) (Entered: 12/11/2012)

12/11/2012	94	MINUTES OF Jury Trial – 1st Day held before Judge John F. Walter as to Defendant Lawrence Eugene Shaw: Jury empaneled and sworn. Opening statements made. Witnesses called, sworn and testified. Exhibits identified and admitted. Jury Trial set for 12/12/2012 at 8:00 AM before Judge John F. Walter. Court Reporter: Victoria Valine. (kbr) (Entered: 12/14/2012)
12/12/2012	95	MINUTES OF Jury Trial – 2nd Day held before Judge John F. Walter as to Defendant Lawrence Eugene Shaw: Witnesses called, sworn and testified. Exhibits identified and admitted. Jury Trial set for 12/13/2012 at 8:00 AM before Judge John F. Walter. Court Reporter: Victoria Valine. (kbr) (Entered: 12/14/2012)
12/13/2012	96	MINUTES OF Jury Trial – 3rd Day held before Judge John F. Walter as to Defendant Lawrence Eugene Shaw. Closing arguments made. Jury polled. Verdict reached. Jury finds: Lawrence Eugene Shaw (1) Guilty on Counts 1-14,and 17; not Guilty on Counts 15-16. Defendant referred to Probation Office for Investigation and Report. Defendant Lawrence Eugene

		Shaw remanded to custody. Bond exonerated. Sentencing set for 3/11/2013 at 9:00 AM before Judge John F. Walter. Court Reporter: Victoria Valine. (kbr) (Entered: 12/14/2012)
12/13/2012	98	Jury Instructions (Given) by Judge John F. Walter as to Defendant Lawrence Eugene Shaw. (kbr) (Entered: 12/14/2012)
12/13/2012	103	JURY VERDICT FILED (lc) (Entered: 12/14/2012)
12/13/2012	106	REDACTED JURY VERDICT. (kbr) (Entered: 12/17/2012)
12/14/2012	100	PROPOSED JURY INSTRUCTIONS (Clean set) filed by Defendant Lawrence Eugene Shaw (Bell, Koren) (Entered: 12/14/2012)
12/14/2012	101	PROPOSED JURY INSTRUCTIONS (Disputed set) filed by Defendant Lawrence Eugene Shaw (Bell, Koren) (Entered: 12/14/2012)
12/14/2012	102	MEMORANDUM OF LAW IN SUPPORT OF DEFENSE DISPUTED JURY INSTRUCTIONS 17,19,21 filed by Defendant Lawrence Eugene Shaw (Bell, Koren) (Entered: 12/14/2012)
03/22/2013	147	NOTICE OF APPEAL to Appellate Court filedby Defendant

		Lawrence Eugene Shaw WAIVED. (Bell, Koren) (Entered: 03/22/2013)
03/22/2013	148	MINUTES OF Hearing on Motion to Dismiss Multipicitous Counts and Renewed Motion for Bail Pending Appeal 139 ; SENTENCING Hearing held before Judge John F. Walter as to Defendant Lawrence Eugene Shaw (1), Count(s) 1-12, 14, 17, Defendant is committed on Counts 1 through 12, 14, and 17 of the Indictment to the custody of the Bureau of Prisons for 57 months, all to be served concurrently Supervised release for 5 years under the terms and conditions of US Probation Office, General Order 05-02, and General Order 01-05. Special assessment of $1,400.00; Restitution of $282,380.00; Defendant shall comply with General Order No. 01-05; All fines are waived; Government's dismissed Count 13 at trial; Verdict of NOT GUILTY on Counts 15 and 16 Defendant advised of right of appeal. Refer to Judgment and Probation/Commitment Order. The Court DENIES the Renewed Motion for Bail Pending Appeal

		97. Court Reporter: Victoria Valine. (jp) (Entered: 03/25/2013)
03/22/2013	149	JUDGMENT AND COMMITMENT by Judge John F. Walter as to Defendant Lawrence Eugene Shaw (1), Defendant is committed on Counts 1 through 12, 14, and 17 of the Indictment to the custody of the Bureau of Prisons for 57 months, all to be served concurrently Supervised release for 5 years under the terms and conditions of US Probation Office, General Order 05-02, and General Order 01-05. Special assessment of $1,400.00; Restitution of $282,380.00; Defendant shall comply with General Order No. 01-05; Government's dismissed Count 13 at trial; Verdict of NOT GUILTY on Counts 15 and 16; All fines are waived; Defendant advised of right of appeal. (jp) (Entered: 03/25/2013)

United States Court of Appeals
for the Ninth Circuit

United States v. Lawrence Eugene Shaw

Case No. 13-50136

Relevant Docket Entries

Date	Docket Number	Proceedings
10/16/2013	8	Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellant Lawrence Eugene Shaw. Date of service: 10/16/2013. [8824308] – [COURT UPDATE: replaced brief per req from csl; resent notice. 10/17/2013 by ASW] (Bell, Koren) [Entered: 10/16/2013 07:25 PM]
10/18/2013	9	Filed clerk order: The opening brief [8] submitted by Lawrence Eugene Shaw is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the

		excerpts of record [8] submitted by Lawrence Eugene Shaw. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [8826654] (CT) [Entered: 10/18/2013 09:45 AM]
12/20/2013	18	Submitted (ECF) Answering Brief for review. Submitted by Appellee USA. Date of service: 12/20/2013. [8911157] (Wilkison, Tracy) [Entered: 12/20/2013 01:15 PM]
12/23/2013	21	Filed clerk order: The answering brief [18] submitted by USA is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8913547] (CT) [Entered: 12/23/2013 01:48 PM]
02/03/2014	23	Submitted (ECF) Reply Brief for review. Submitted by Appellant Lawrence Eugene Shaw. Date of service: 02/03/2014. [8964122]

		(Bell, Koren) [Entered: 02/03/2014 05:16 PM]
02/04/2014	24	Filed clerk order: The reply brief [23] submitted by Lawrence Eugene Shaw is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [8965025] (CT) [Entered: 02/04/2014 11:51 AM]
07/14/2014	26	Submitted (ECF) Supplemental Brief for review. Submitted by Appellee USA. Date of service: 07/14/2014. [9168084] (Wilkison, Tracy) [Entered: 07/14/2014 03:20 PM]
07/14/2014	27	Submitted (ECF) Supplemental Brief for review. Submitted by Appellant Lawrence Eugene Shaw. Date of service: 07/14/2014. [9168183] (Bell, Koren) [Entered: 07/14/2014 03:41 PM]
07/15/2014	28	Filed clerk order: The supplemental brief [26] submitted by

		USA is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: tan. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [9168999] (CT) [Entered: 07/15/2014 09:44 AM]
07/15/2014	29	Filed clerk order: The supplemental brief [27] submitted by Lawrence Eugene Shaw is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: tan. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [9169013] (CT) [Entered: 07/15/2014 09:48 AM]
11/17/2014	35	ARGUED AND SUBMITTED TO MARY M. SCHROEDER, HARRY PREGERSON and JACQUELINE

		H. NGUYEN. [9315081] (BG) [Entered: 11/17/2014 10:41 AM]
03/27/2015	36	FILED OPINION (MARY M. SCHROEDER, HARRY PREGERSON and JACQUELINE H. NGUYEN) AFFIRMED. Judge: MMS Authoring, FILED AND ENTERED JUDGMENT. [9474263] (RMM) [Entered: 03/27/2015 07:45 AM]
05/11/2015	39	Filed (ECF) Appellant Lawrence Eugene Shaw petition for panel rehearing and petition for rehearing en banc (from 03/27/2015 opinion). Date of service: 05/11/2015. [9533189] [13-50136] – [COURT UPDATE: Attached opinion. 05/12/2015 by RY] (Bell, Koren) [Entered: 05/11/2015 09:16 PM]
06/08/2015	40	Filed order (MARY M. SCHROEDER, HARRY PREGERSON and JACQUELINE H. NGUYEN) The panel has voted to deny Appellant's petition for panel rehearing. Judges Pregerson and Nguyen have voted to deny the petition for rehearing en banc, and Judge Schroeder has so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed.

		R. App. P. 35. Appellant's petition for panel rehearing and petition for rehearing en banc are denied. Further petitions for rehearing and rehearing en banc shall not be entertained. [9564407] (WL) [Entered: 06/08/2015 09:37 AM]
06/18/2015	41	MANDATE ISSUED.(MMS, HP and JHN) [9579222] (RR) [Entered: 06/18/2015 10:50 AM]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

June 2012 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. LAWRENCE EUGENE SHAW, Defendant.	CR 12 00862 INDICTMENT [18 U.S.C. § 1344(1): Bank Fraud; 18 U.S.C. § 2(b): Causing an Act to Be Done] (Filed Sep. 11, 2012)

The Grand Jury charges:

INTRODUCTORY ALLEGATIONS

At all times relevant to this Indictment:

FINANCIAL INSTITUTIONS

1. Bank of America, National Association ("BOA") and Washington Mutual Bank ("WaMu") were federally insured financial institutions.

COUNTS ONE THROUGH SEVENTEEN

[18 U.S.C. §§1344(1), 2(b)]

2. The Grand Jury repeats, re-alleges, and incorporates by reference all of the introductory allegations set forth in paragraph 1 as if set forth herein.

A. THE FRAUDULENT SCHEME

3. Beginning on a date unknown to the Grand Jury, but no earlier than on or about June 4, 2007, and continuing through on or about October 30, 2007, in Los Angeles County, within the Central District of California, and elsewhere, defendant LAWRENCE EUGENE SHAW ("Defendant"), together with others known and unknown to the Grand Jury, knowingly and with intent to defraud, executed a scheme to defraud BOA, WaMu, and other financial institutions as to material matters.

4. The fraudulent scheme operated, in substance, in the following manner:

a. Defendant caused transfers to be made from the BOA account belonging to victim S.H. (the "S.H. BOA Account") to a PayPal account that Defendant caused to be opened in the name of S.H. (the "PayPal Account").

b. Defendant caused transfers to be made from the PayPal Account to one of two WaMu accounts ending in 941-1 and 124-7 that he opened in the name of "Richard Shaw" (respectively, the "941-1 First-Tier Account" and the "124-7 First-Tier Account"; collectively referred to as the "First-Tier Accounts")

c. Defendant caused transfers to be made from the First-Tier Accounts to another WaMu account that he opened in the name of "Richard Shaw" (the "Second-Tier Account").

d. Defendant caused checks to be written from the Second-Tier Account to himself.

e. Defendant caused these checks written to himself to be deposited into a WaMu account that he held with another individual (the "Joint WaMu Account") and caused payments, transfers, and withdrawals to be made from that account.

B. THE EXECUTIONS OF THE FRAUDULENT SCHEME

5. On or about the following dates, in Los Angeles County, within the Central District of California, and elsewhere, Defendant, together with others known and unknown to the Grand Jury, committed and willfully caused others to commit the following acts, each of which constituted an execution of the fraudulent scheme:

COUNT	DATE	ACT
ONE	06/04/07	Transfer of $7,000 from S.H. BOA Account to PayPal Account
TWO	06/06/07	Transfer of $400 from the PayPal Account to the 941-1 First-Tier Account
THREE	06/08/07	Transfer of $5,600 from the PayPal Account to the 941-1 First-Tier Account
FOUR	06/08/07	Transfer of $400 from the 941-1 First-Tier Account to the Second-Tier Account

FIVE	06/08/07	Issuance of $400 check in Defendant's name from the Second-Tier Account
SIX	06/11/07	Transfer of $5,500 from the 941-1 First-Tier Account to the Second-Tier Account
SEVEN	06/11/07	Issuance of $5,000 check in Defendant's name from the Second-Tier Account
EIGHT	06/11/07	Deposit of $4,900 into the Joint WaMu Account
NINE	10/11/07	Transfer of $8,200 from S.H. BOA Account to PayPal Account
TEN	10/13/07	Transfer of $8,500 from the PayPal Account to the 124-7 First-Tier Account
ELEVEN	10/15/07	Transfer of $8,200 from S.H. BOA Account to PayPal Account
TWELVE	10/15/07	Transfer of $8,500 from the 124-7 First-Tier Account to the Second-Tier Account
THIRTEEN	10/15/07	Transfer of $8,000 from the PayPal Account to the 124-7 First-Tier Account
FOURTEEN	10/17/07	Issuance of $8,500 check in Defendant's name from the Second-Tier Account
FIFTEEN	10/26/07	Deposit of $1,250 into the Joint WaMu Account

SIXTEEN	10/29/07	Deposit of $660 into the Joint WaMu Account
SEVENTEEN	10/30/07	Issuance of $180 check in Defendant's Name from the Second-Tier Account

A TRUE BILL

/S/

Foreperson

ANDRÉ BIROTTE JR.
United States Attorney

/s/ Robert Dugdale
ROBERT E. DUGDALE
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Chief, Criminal Division

WESLEY L. HSU
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ERIC D. VANDEVELDE
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RONALD CHENG
Assistant United States Attorney
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. LAWRENCE EUGENE SHAW, Defendant.	Case No. **CR 12-862-JFW** **JURY INSTRUCTIONS** (Filed Dec. 13, 2012)

* * *

COURT'S INSTRUCTION NO. 17.

The defendant is charged in Counts One through Twelve, and Counts Fourteen through Seventeen of the Indictment with bank fraud, in violation of Section 1344(1) of Title 18 of the United States Code. In order for the defendant to be found guilty of bank fraud, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly executed a scheme to defraud a financial institution as to a material matter;

Second, the defendant did so with the intent to defraud the financial institution; and

Third, the financial institution was insured by the Federal Deposit Insurance Corporation.

COURT'S INSTRUCTION NO. 18.

The phrase "scheme to defraud" means any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, or deprive a financial institution of something of value.

It is not necessary for the government to prove that a financial institution was the only or sole victim of the scheme to defraud. It is also not necessary for the government to prove that the defendant was actually successful in defrauding any financial institution. Finally, it is not necessary for the government to prove that any financial institution lost any money or property as a result of the scheme to defraud.

COURT'S INSTRUCTION NO. 19.

A material matter is one that has a natural tendency to influence or is capable of influencing a financial institution to part with money or property.

COURT'S INSTRUCTION NO. 20.

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. The government is not required to prove that the defendant knew that his acts or omissions were unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted knowingly.

COURT'S INSTRUCTION NO. 21.

An intent to defraud is an intent to deceive or cheat.

COURT'S INSTRUCTION NO. 22.

The intent of a person or the knowledge that a person possesses at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew or what a person intended at a particular time, you may consider any statements made or acts done by that person and all other facts and circumstances received in evidence which may aid in your determination of that person's knowledge or intent.

COURT'S INSTRUCTION NO. 23.

If you decide that a defendant was a member of a scheme to defraud and that the defendant had the intent to defraud, the defendant may be responsible for other co-schemers' actions during the course of or in furtherance of the scheme, even if the defendant did not know what they said or did.

For a defendant to be guilty of an offense committed by a co-schemer in furtherance of the scheme, the offense must be one that the defendant could reasonably foresee as a necessary and natural consequence of the scheme to defraud.

COURT'S INSTRUCTION NO. 24.

A victim's negligence, gullibility, or even foolishness is not a defense to a charge of bank fraud.

* * *

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Attorneys for Defendant
LAWRENCE SHAW

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. LAWRENCE SHAW, Defendant.	NO. CR 12-862-JFW **DEFENSE DISPUTED JURY INSTRUCTIONS 17, 19, 21** **IN CAMERA** [Provided to Government on 12/11/12] (Filed Dec. 14, 2012)

In accordance with the Court's Order of December 7, 2012, Defendant Lawrence Shaw, through his counsel of record, Deputy Federal Public Defenders Koren

L. Bell and Jason Hannan, hereby files Disputed Jury Instructions 17, 19 and 21.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED:
December 10, 2012

By: /s/ Koren L. Bell
KOREN L. BELL
Deputy Federal
Public Defender

DEFENSE PROPOSED JURY INSTRUCTION 17

RE: ELEMENTS OF 18 U.S.C. § 1344(1)

Proposed Jury Instruction for Counts (1), (9) and (11) ("BOA" Counts):

(1) The defendant knowingly carried out a scheme to defraud BOA; that is a scheme designed to victimize BOA by causing BOA, not only Stanley Hsu, monetary loss;

(2) The defendant actively deceived BOA as to a material fact; that is, a fact that had a natural tendency to influence, or was capable of influencing, BOA to part with money or property;

(3) The defendant acted with the specific intent to defraud BOA; that is, with the intent to deceive and cheat BOA in order to expose BOA, not only Stanley Hsu, to monetary loss.

(4) BOA was federally insured by the FDIC.

It is not enough for the government to prove that Mr. Shaw carried out a scheme to obtain Mr. Hsu's money by deceiving Bank of America. In order to convict Mr. Shaw, you must find that Bank of America itself was both the target of his deception and an intended victim of the fraud.

Proposed Jury Instruction for Remaining Counts ("WaMu" Counts):

(1) The defendant knowingly carried out a scheme to defraud WaMu; that is a scheme designed to victimize WaMu, not only Stanley Hsu and/or Richard Shaw,[1] by causing WaMu itself monetary loss;

(2) The defendant actively deceived WaMu as to a material fact; that is, fact that had a natural tendency to influence, or was capable of influencing, WaMu to part with money or property;

(3) The defendant acted with the specific intent to defraud WaMu; that is, with the intent to deceive and cheat WaMu, not only Stanley Hsu and/or Richard Shaw, in order to expose WaMu itself to monetary loss.

(4) WaMu was federally insured by the FDIC.

---

[1] This references to Richard Shaw in this disputed jury instruction has been added to the instruction originally proposed in the *in camera* brief filed with the Court on 12/5/12 to address the government's theory of the case as set forth in the parties' Joint Statement of the Indictment, *see* Dkt. 65, that both Stanley Hsu and Richard Shaw were "victim(s)" of the scheme.

It is not enough for the government to prove that Mr. Shaw carried out a scheme to obtain Mr. Hsu's funds by deceiving Washington Mutual. Nor is it enough for the government to prove that Mr. Shaw intended to deceive Richard Shaw in connection with the Washington Mutual accounts in Richard Shaw's name. In order to convict Mr. Shaw, you must find that Washington Mutual itself was both the target of his deception and an intended victim of the fraud.

DEFENSE PROPOSED JURY INSTRUCTION 19

RE: "INTENT TO DEFRAUD"

The defense proposed instruction for "intent to defraud" is subsumed in element (3) of its proposed instruction for 18 U.S.C. § 1344(1), *supra*, as follows:

For Counts (1), (9) and (11) ("BOA" Counts):

For purposes of Counts (1), (9) and (11), the "specific intent to defraud BOA" is the intent to deceive and cheat BOA in order to expose BOA, not only Stanley Hsu, to monetary loss.

For Remaining Counts ("WaMu" Counts):

For purposes of the remaining Counts in the Indictment, the "specific intent to defraud WaMu" is the intent to deceive and cheat WaMu, not only Stanley Hsu and/or Richard Shaw, in order to expose WaMu itself to monetary loss.

DEFENSE PROPOSED JURY INSTRUCTION 21

RE: "SCHEME TO DEFRAUD"

The defense proposed instruction for "scheme to defraud" is subsumed in element (1) of its proposed instruction for 18 U.S.C. § 1344(1), *supra*, as follows:

For Counts (1), (9) and (11) ("BOA" Counts):

For purposes of Counts (1), (9) and (11), "a scheme to defraud BOA" is a scheme designed to victimize BOA by causing BOA, not only Stanley Hsu, monetary loss.

For Remaining Counts ("WaMu" Counts):

For purposes of the remaining Counts, a "scheme to defraud WaMu" is a scheme designed to victimize WaMu, not only Stanley Hsu and/or Richard Shaw, by causing WaMu itself monetary loss.

JS-3/ent

United States District Court
Central District of California

UNITED STATES OF AMERICA vs.	**Docket No. CR 12-862-JFW**
Defendant Lawrence Eugene Shaw [63466-112]	**Social Security No.** 9519 (Last 4 digits)
akas: Lawrence Shaw; Yu Hsiao; Yu Jen Jen; Lawrence Yujen Hsiao; Larry Shaw; Lawrence Y. Hsiao	(Filed Mar. 22, 2013)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

MONTH	DAY	YEAR
March	22	2013

COUNSEL | **Koren L. Bell, DFPD**
(Name of Counsel)

PLEA | ☐ **GUILTY**, and the court being satisfied that there is a factual basis for the plea. ☐ **NOLO CONTENDERE** ☐ **NOT GUILTY**

FINDING	There being a verdict of **GUILTY,** defendant has been convicted as charged of the offense(s) of: Bank Fraud, Causing an Act to be Done in violation of 18 U.S.C. §§ 1344(1), 2(b) as charged in Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 17 of the Seventeen-Count Indictment filed on September 11, 2012 **AND** a verdict of **NOT GUILTY** on Counts 15 and 16. Count 13 dismissed by Government at trial.
JUDGMENT AND PROB/ COMM ORDER	The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of:

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant, Lawrence Eugene Shaw, is hereby committed on Counts 1 through 12, 14, and 17 of the Indictment to the custody of the Bureau of Prisons for a term of 57 months. This term consists of 57 months on each of Counts 1 through 12, 14 and 17 of the Indictment, all to be served concurrently.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years. This term consists of five years on each of Counts 1 through 12, 14 and 17 all such terms to run concurrently, under the following terms and conditions.

1. The defendant shall comply with the rules and regulations of the U. S. Probation Office, General Order 05-02, and General Order 01-05, including the three special conditions delineated in General Order 01-05;

2. During the period of community supervision the defendant shall pay the special assessment and restitution in accordance with this judgment's orders pertaining to such payment;

3. The defendant shall apply all monies received from income tax refunds, lottery winnings, inheritance, judgements and any anticipated or unexpected financial gains to the outstanding court-ordered financial obligation;

4. The defendant shall not be employed by, affiliated with, own or control, or otherwise participate, directly or indirectly, in the conduct of the affairs of any financial institution insured by the Federal Deposit Insurance Corporation;

5. The defendant shall not obtain or possess any driver's license, Social Security number, birth certificate, passport or any other form of identification in any name, other than the defendant's true legal name; nor shall the defendant use, for any purpose or in any manner, any name other than his true legal name or names without the prior written approval of the Probation Officer;

6. The defendant shall cooperate in the collection of a DNA sample from the defendant;

7 The defendant shall possess and use only those computers and computer-related devices, screen user names, passwords, email accounts, and internet service providers (ISPs), which have been disclosed to the Probation Officer upon commencement of supervision. Any changes or additions are to be disclosed to the Probation Officer prior to the first use. Computers and computer-related devices are personal computers, personal data assistants (PDAs), internet appliances, electronic games, cellular telephones, and digital storage media, as well as their peripheral equipment, that can access, or can be modified to access, the internet, electronic bulletin boards, and other computers;

8. All computers, computer-related devices, and their peripheral equipment, used by the defendant shall be subject to search and seizure. This shall not apply to items used at the employment's site, which are maintained and monitored by the employer;

9. The defendant shall comply with the rules and regulations of the Computer Monitoring Program. The defendant shall pay the cost of the Computer Monitoring Program, in an amount not to exceed $32 per month per device connected to the internet;

10. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer;

11. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath, and/or sweat patch testing, as directed by the Probation Officer. The defendant shall abstain from using illicit drugs and alcohol, and abusing prescription medications during the period of supervision;

12. During the course of supervision, the Probation Officer, with the agreement of the defendant and defense counsel, may place the defendant in a residential drug treatment program approved by the United States Probation Office for treatment of narcotic addiction or drug dependency, which may include counseling and testing, to determine if the defendant has reverted to the use of drugs, and the defendant shall reside in the treatment program until discharged by the Program Director and Probation Officer; and

13. As directed by the Probation Officer, the defendant shall pay all or part of the costs of treating the defendant's substance abuse to the aftercare contractor during the period of community supervision, pursuant to 18 U.S.C. § 3672. The defendant shall provide payment and proof of payment as directed by the Probation Officer.

The Court authorizes the Probation Office to disclose the Presentence Report to the substance abuse treatment provider to facilitate the defendant's treatment for narcotic addiction or drug dependency. Further redisclosure of the Presentence Report by the treatment provider is prohibited without the consent of the sentencing judge.

It is ordered that the defendant shall pay to the United States a special assessment of $1,400, which is due immediately.

It is ordered that the defendant shall pay restitution in the total amount of $282,380 pursuant to 18 U.S.C. § 3663A.

The amount of restitution ordered shall be paid as follows:

- S.H. $174,544
- PayPal $107,836

If the defendant makes a partial payment, each payee shall receive approximately proportional payment unless another priority order or percentage payment is specified in this judgment.

Restitution shall be due during the period of imprisonment, at the rate of not less than $25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

If any amount of the restitution remains unpaid after release from custody, nominal monthly payments of at least 10 percent of defendants's gross monthly income, but not less than $100, whichever is greater, during the period of supervised release. These payments shall begin 30 days after the commencement of supervision. Nominal restitution payments are ordered as the court finds that the defendant's economic circumstances do not allow for either immediate or future payment of the amount ordered.

Pursuant to 18 U.S.C. § 3612(f)(3)(A), interest on the restitution ordered is waived because the defendant does not have the ability to pay interest. Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

The defendant shall comply with General Order No. 01-05.

Pursuant to Guideline Section 5E1.2(a), all fines are waived as the Court finds that the defendant is unable to pay and is not likely to become able to pay any fine in addition to restitution.

Defendant informed of right to appeal.

Court recommends that the defendant be placed in a facility located in Southern California.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

March 22, 2013 /s/ John F. Walter
Date U.S. District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

March 22, 2013
Filed Date

By Shannon Reilly /s/
Deputy Clerk

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant shall not commit another Federal, state or local crime;
2. the defendant shall not leave the judicial district without the written permission of the court or probation officer;
3. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
4. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5. the defendant shall support his or her dependents and meet other family responsibilities;

6. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7. the defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;

8. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

10. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

13. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to conform the defendant's compliance with such notification requirement;

15. the defendant shall, upon release from any period of custody, report to the probation officer within 72 hours;

16. and, *for felony cases only:* not possess a firearm, destructive device, or any other dangerous weapon.

☒ The defendant will also comply with the following special conditions pursuant to General Order 01-05 (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant shall pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment pursuant to 18 U.S.C. §3612(f)(1). Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g). Interest and penalties

pertaining to restitution, however, are not applicable for offenses completed prior to April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant shall pay the balance as directed by the United States Attorney's Office. 18 U.S.C. §3613.

The defendant shall notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. §3612(b)(1)(F).

The defendant shall notify the Court through the Probation Office, and notify the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. §3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution – pursuant to 18 U.S.C. §3664(k). See also 18 U.S.C. §3572(d)(3) and for probation 18 U.S.C. §3563(a)(7).

Payments shall be applied in the following order:

1. Special assessments pursuant to 18 U.S.C. §3013;
2. Restitution, in this sequence:

   Private victims (individual and corporate),

Providers of compensation to private victims,
The United States as victim;

3. Fine;
4. Community restitution, pursuant to 18 U.S.C. §3663(c); and
5. Other penalties and costs.

SPECIAL CONDITIONS FOR PROBATION AND SUPERVISED RELEASE

As directed by the Probation Officer, the defendant shall provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure; and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant shall not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant shall maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds shall be deposited into this account, which shall be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, shall be disclosed to the Probation Officer upon request.

The defendant shall not transfer, sell, give away, or otherwise convey any asset with a fair market value

in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____

the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

_____ By _____

Date Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

_____ By _____

Filed Date Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____

Defendant Date

_____ _____

U. S. Probation Officer/ Designated Witness Date

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LAWRENCE EUGENE SHAW, *Defendant-Appellant.*	No. 13-50136 D.C. No. 2:12-cr-00862-JFW-1 OPINION

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted
November 17, 2014 – Pasadena California

Filed March 27, 2015

Before: Mary M. Schroeder, Harry Pregerson,
and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY*

Criminal Law

The panel affirmed a conviction for a scheme to defraud a financial institution, in violation of 18 U. S.C. § 1344(1), in a case in which the defendant used PayPal to convince banks that he was a particular bank customer and thus had authority to transfer money out of that customer's bank accounts and into a PayPal account in the defendant's control.

The panel held that for a violation of § 1344(1), the government need not prove that the defendant intended the bank to be the principal financial victim of the fraud, and that the district court therefore correctly refused jury instructions that included such a requirement.

COUNSEL

Sean Kennedy, Federal Public Defender, Koren L. Bell (argued), Deputy Federal Public Defender, Los Angeles, California, for Defendant-Appellant.

André Birotte, Jr., United States Attorney, Robert E. Dugdale, Assistant United States Attorney, Tracy L. Wilkison (argued), Assistant United States Attorney, Los Angeles, California, for Plaintiff-Appellee.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

OPINION

SCHROEDER, Circuit Judge:

Congress enacted the Bank Fraud Act in 1984, and ever since, the federal courts have grappled with whether its provisions require proof of an intent to cause harm to the bank itself. The Act contains two clauses: the first criminalizes schemes "to defraud a financial institution," and the second schemes to obtain bank assets or property under its control "by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344. Last year, the Supreme Court held that the second clause does not require proof that the defendant intended to defraud the bank. *Loughrin v. United States*, 134 S. Ct. 2384, 2387 (2014). In this case, we deal with the first clause, which by its terms does require such proof. The question here is whether that means the government must prove the defendant intended the bank to be the principal financial victim of the fraud.

The principal intended victim in this case, at least according to the defendant, was a bank customer, Stanley Hsu. The defendant, Lawrence Shaw, had access to the victim's bank statements. The gist of Shaw's scheme was to use PayPal, an online payment and money transfer service, to convince the banks that he was Hsu and thus had authority to transfer money out of Hsu's bank accounts and into the PayPal account in Shaw's control.

The government charged Shaw with violating § 1344(1). Shaw sought a jury instruction that, under

§ 1344(1), the government had to prove not only that he intended to deceive the bank, but that he also intended to target the bank as the principal financial victim of the fraud, rather than the account holder or PayPal. The district court refused to give such an instruction, concluding that clause 1 required proof only that the defendant intended to deceive the bank, not that he also intended the bank to bear the loss.

While the circuits are divided as to the requirements of § 1344(1), our Ninth Circuit case law answers Shaw's argument. We have held that, to the extent § 1344(1) requires any intent to expose the bank to a risk of loss, the requirement is easily satisfied by the bank's having to bear some potential administrative expenses that necessarily result from being defrauded. *See United States v. Wolfswinkel*, 44 F.3d 782, 786 (9th Cir. 1995). We did not hold that the bank needed to be the intended financial victim of the fraud. In this case, a principal intended financial victim of the fraud was the bank customer who held the account, and our law has dealt with that specific situation. We have held that the statute is violated where the bank is the target of the deception, even if bank customers were the intended financial victims of the fraud. *See United States v. Bonallo*, 858 F.2d 1427, 1429-30, 1430 n.2 (9th Cir. 1988).

These cases help define the meaning in this circuit of § 1344(1)'s element of intent "to defraud," and establish that it does not include intent to financially victimize the bank. That result is fully consistent with the Supreme Court's decision in *Loughrin*, and indeed

complements *Loughrin's* holding that § 1344(2) of the statute does not require any intent to defraud the bank. Section 1344(1) does require intent to defraud the bank, but neither clause requires the bank to be the intended financial victim of the fraud. We therefore affirm the conviction.

BACKGROUND

The charges in this case arose from a scheme defendant Shaw devised to take money from bank accounts belonging to Stanley Hsu, a Taiwanese businessman. Hsu opened a Bank of America account while working in the United States. When he returned to Taiwan, he arranged for the daughter of one of his employees to receive his mail in the States and forward it to him in Taiwan. Shaw was living with the daughter and routinely checked her mail. When Hsu's Bank of America statements began to arrive, Shaw opened them and learned Hsu's account and personal information.

Shaw used the information from Hsu's statements to execute the following scheme: he opened an email account in Hsu's name, then used this email account and Hsu's personal information to open a PayPal account. Shaw "linked" the PayPal account to Hsu's account with Bank of America. He was able to circumvent PayPal's security measures because of his access to the information in Hsu's bank statements.

On June 4, 2007, Shaw opened two accounts with Washington Mutual under the name of his father,

Richard Shaw, without his father's knowledge or permission. One account was a savings account ("Tier 1" account), which Shaw linked to the fake Hsu PayPal account. During the process of linking the Tier 1 account with the Hsu PayPal account, PayPal identified the request as suspicious. PayPal sent an email to the fake Hsu email account asking for additional information. In response, Shaw faxed PayPal a copy of Hsu's Bank of America account statement, and a bank statement he had altered to appear as if Hsu owned the Richard Shaw accounts. He also sent a copy of Hsu's driver's license, which he had altered to have a younger birth date. On the basis of these falsified documents, Washington Mutual and PayPal allowed the savings account in the name of Shaw's father and the PayPal account in Hsu's name to be linked.

The second account Shaw opened in his father's name was a checking account ("Tier 2" account). This account was linked to the Tier 1 savings account. Shaw's scheme ultimately siphoned the funds into a third Washington Mutual account, a joint account which Shaw had previously opened in his and the daughter's name, although without her knowledge.

Once the accounts were set up and linked, Shaw began to withdraw money from Hsu's Bank of America account through a series of online transfers and checks written to himself. He would transfer money from the Hsu Bank of America account first to the Hsu PayPal account, then transfer it from the Hsu PayPal account to the Tier 1 savings account with Washington Mutual.

Then, Shaw would transfer money from the Tier 1 account to the Tier 2 checking account, which allowed him to write checks to himself, signing his father's name. Finally, he would deposit those checks into the Washington Mutual joint account that he controlled.

Using this scheme, Shaw was able to convince the banks to transfer and release approximately $307,000 of Hsu's money to Shaw between June and October 2007. Hsu's son discovered the missing money in October 2007, reported the fraud and closed the Bank of America account.

Bank of America returned approximately $131,000 to Hsu, covering the fraudulent activity that occurred within 60 days of the reported fraud. PayPal reimbursed Bank of America for this amount. In the end, PayPal bore approximately $106,000 of the loss and Hsu over $170,000, because Hsu did not notify the banks of the losses within 60 days of many of the fraudulent transactions, as the parties all agree was required by standard banking practice.

DISTRICT COURT PROCEEDINGS

The government charged Shaw with 17 counts of bank fraud in violation of § 1344(1) and in December 2012 the case went to trial before a jury. The defense theory was that a bank fraud conviction under § 1344(1) requires fraudulent intent to expose the bank itself to monetary loss, and Shaw intended only to expose PayPal and Stanley Hsu to any monetary

loss. Shaw argued that "intent to defraud" means intent to deceive and cheat the bank. Shaw therefore asked for jury instructions which would require the government to prove that Shaw had intended the bank to be not only the target of the deception, but to suffer an actual loss or risk of loss as the financial victim of the fraud. His requested instructions provided:

> (1) The defendant knowingly carried out a scheme to defraud [the bank]; that is a scheme designed to victimize [the bank] by causing [the bank], not only Stanley Hsu, monetary loss;
>
> (2) The defendant actively deceived [the bank] as to a material fact; that is, a fact that had a natural tendency to influence, or was capable of influencing, [the bank] to part with money or property;
>
> (3) The defendant acted with the specific intent to defraud [the bank]; that is, with the intent to deceive and cheat [the bank] in order to expose [the bank], not only Stanley Hsu, to monetary loss.
>
> (4) [The bank] was federally insured by the FDIC.
>
> It is not enough for the government to prove that Mr. Shaw carried out a scheme to obtain Mr. Hsu's money by deceiving [the bank]. In order to convict Mr. Shaw, you must find that [the bank] itself was both the target of his deception and an intended victim of the fraud.

The district court declined to give Shaw's requested jury instructions. The district court concluded that risk of loss was an element that the bank fraud statute did not require, and that the bank need not be an intended financial victim of the fraud. Instead, the trial judge gave instructions based on a combination of model jury instructions and instructions used in previous bank fraud cases in the Ninth Circuit. The judge instructed the jury that:

> [i]n order for the defendant to be found guilty of bank fraud, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant knowingly executed a scheme to defraud a financial institution as to a material matter;
>
> Second, the defendant did so with the intent to defraud the financial institution; and
>
> Third, the financial institution was insured by the Federal Deposit Insurance Corporation.
>
> . . .
>
> The phrase "scheme to defraud" means any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, or deprive a financial institution of something of value. It is not necessary for the government to prove that a financial institution was the only or sole victim of the scheme to defraud. It is also not necessary for the government to prove that the defendant was actually

> successful in defrauding any financial institution. Finally, it is not necessary for the government to prove that any financial institution lost any money or property as a result of the scheme to defraud.
>
> An intent to defraud is an intent to deceive or cheat.

The jury convicted Shaw of 14 counts of bank fraud on December 13, 2012, and this appeal followed.

DISCUSSION

The bank fraud statute, 18 U.S.C. § 1344, provides:

> Whoever knowingly executes, or attempts to execute a scheme or artifice –
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

In *Loughrin v. United States*, the Supreme Court construed the second clause, and held that it does not require the government to prove that the defendant intended to defraud the bank. 134 S. Ct. 2384, 2387

(2014). Section 1344(2) targets schemes to obtain property held by the bank via misrepresentation to a third party, while § 1344(1) penalizes schemes to defraud the bank itself. *See id.* at 2389-92. The Supreme Court effectively required courts to treat the two clauses separately, holding that while they overlap substantially, the clauses are disjunctive and establish distinct offenses. *Id.* at 2390, 2390 n.4.

In holding that the two clauses create separate offenses, the Court rejected the reasoning of the Third Circuit. *See id.* at 2388-89. The Third Circuit held that clauses 1 and 2 conjunctively create only one offense, and thus all violations of the statute require both the intent to defraud the bank and that the bank be exposed to a risk of loss under the relevant law. *United States v. Thomas*, 315 F.3d 190,199-201 (3d Cir. 2002) (holding that under both clauses, "a defendant must intend to cause a bank a loss or potential liability, whether by way of statutory law, common law, or business practice" (internal quotation marks omitted)). The Supreme Court expressly held that § 1344(2) does not require either intent to defraud a bank or a risk of loss to a bank. *Loughrin*, 134 S. Ct. at 2389-90, 2395 n.9. In doing so, it emphasized that intent to defraud a bank is the essence of § 1344(1). *Id.* at 2389-90.

Shaw's argument in this case therefore focuses on the difference between the two clauses. He points out that the second clause covers schemes intended to obtain a third party's property. He argues that the first clause, under which he was convicted, therefore must require that a defendant intend to obtain the bank's

property. Thus, he asks us to conclude that a conviction under § 1344(1) requires a showing that the defendant intended to expose the bank to the principal risk of loss. Such a requirement was not satisfied since, in this case, Shaw intended his principal target to have been the bank's customer, Hsu.

Shaw thus seeks to characterize the difference between the two clauses as involving the intended financial victim of the fraud, i.e., the intended bearer of the loss. The language of neither clause of the statute, however, refers to monetary loss or to the risk of such loss. The statutory language focuses on the intended victim of the deception, not the intended bearer of the loss. Section 1344(1) requires the intent to deceive the bank. Section 1344(2) requires false or fraudulent representations or pretenses to third parties. The Supreme Court made this point in *Loughrin* when it noted that the second clause was intended to broaden the scope of bank fraud to include schemes that did not involve deception of the bank directly, such as schemes to use stolen credit cards. *See* 134 S. Ct. at 2391-92. Section 1344(1) thus covers schemes to deceive the bank directly. Neither clause requires the government to establish the defendant intended the bank to suffer a financial loss.

Analysis of our circuit's law before *Loughrin* counsels the same result. In *United States v. Bonallo*, 858 F.2d 1427 (9th Cir. 1988), we recognized that under § 1344(1) the bank itself need not be the sole or primary victim of the scheme. Rather, the bank is defrauded within the meaning of § 1344(1) when it is the

target of the deceit, even if the scheme targeted the bank's customer accounts as the source of the money. *See id.* at 1434 n.9.

In *Bonallo*, a bank employee withdrew funds from his own account via the ATM, then manipulated the bank's computer system to charge the withdrawals against other customers' accounts. *Id.* at 1429-30. The defendant argued that the other customers were the intended victims of his scheme and therefore the bank was not defrauded within the meaning of the statute. We rejected this argument, finding that the bank was the target of his misrepresentation, even if the customers' accounts were the source of the funds. *See id.* at 1434 n.9. In short, the defendant was guilty of bank fraud because he intended to deceive the bank.

In *United States v. Wolfswinkel*, 44 F.3d 782 (9th Cir. 1995), we considered whether a risk of financial loss to a bank was as an element of § 1344(1). We held that even if there were such a requirement of financial loss to the bank, it was easily satisfied. The defendant was convicted of bank fraud under § 1344(1) after he engaged in a check-kiting scheme, during which he convinced a bank officer to sell him cashier's checks paid for with insufficiently-backed checks. *Id.* at 784. On appeal, Wolfswinkel argued that the government had to show he exposed the bank to a risk of loss under § 1344(1), and he had not, because he provided collateral to the bank to secure any losses for the bounced checks. *Id.* at 785-86.

In affirming Wolfswinkel's conviction, we recognized a circuit split as to whether § 1344(1) requires proof of risk of loss to the bank to establish the defendant's intent to defraud. *Id.* at 786. We held, however, that even assuming there were such a requirement, Wolfswinkel's scheme satisfied it. *See id.* Although he had provided security for potential losses, Wolfswinkel exposed the bank to a risk of loss in the form of administrative costs and the threat of competing creditor claims if it were forced to liquidate the collateral. *Id.* The defendant need not have intended the bank to bear the risk of losing the amount involved in the financial scheme itself.

The Supreme Court's decision in *Loughrin* does not affect the validity of our precedent, or undermine it in any way. If anything, it lends credence to our reluctance to impose any risk of loss requirement in a prosecution under the bank fraud statute. *Loughrin* confirms our conclusion that the difference between the two clauses is which entity the defendant intended to deceive, not which entity the defendant intended to bear the financial loss. *See* 134 S. Ct. at 2389-90 (emphasizing that nothing in § 1344(2) requires specific intent to deceive a bank, which § 1344(1) already covers).

Shaw stresses that under the applicable law, the bank, in the end, did not actually lose anything. The losses ultimately fell on Hsu for failing to spot much of the fraud within the legally required 60 days, and on PayPal, which had to reimburse the bank for the rest. Shaw therefore asks us to conclude that he could not

have intended to defraud the bank. A similar argument with respect to clause 2 was dismissed summarily in *Loughrin* on the ground that the federal statute was intended to avoid having cases turn on the technical ramifications of banking law. *Id.* at 2395 n.9. In characterizing § 1344(2), the Court said that the language "appears calculated to avoid entangling courts in technical issues of banking law about whether the financial institution or, alternatively, a depositor would suffer the loss from a successful fraud." *Id.* We conclude that the same legislative intent must be ascribed to § 1344(1). There is no reason to believe Congress wanted courts to become more entangled in such technical issues under the first clause than under the second clause.

We recognize that some circuits have held that risk of financial loss to the bank is an element that must be proven under § 1344(1). *See, e.g., United States v. Staples*, 435 F.3d 860, 866-67 (8th Cir. 2006) (discussing difference of opinion among circuits on whether intent to harm or cause the bank a risk of loss is required). The reason given is that the purpose of the statute is protection of the federal fisc, and that purpose is not served if the bank faces no financial risk. *See, e.g., Thomas*, 315 F.3d at 201. Circuits adopting the requirement cite to the legislative history of the bank fraud statute, which shows that Congress enacted it because of the "strong federal interest in protecting the financial integrity of [federally insured financial] institutions." *See, e.g., id.* (quoting S. Rep. No. 98-225, at 377 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3517.);

United States v. Nkansah, 699 F.3d 743, 759 (2d Cir. 2012) (same). But requiring proof of intent that a bank bear a risk of loss does not serve this end. The entity that bears the risk of loss does not necessarily depend upon the entity (i.e., the federally insured financial institution) that the defendant intends to harm. It depends on the operation of banking laws that, as this case demonstrates, may result in having the instruments of the fraud, like the bank's customers or entities like PayPal, ultimately bear the loss. A scheme that is intended to harm third parties may, in fact, end up hurting the bank, and vice versa. Few criminals have any knowledge of the rules of law that govern which entity bears the risk of loss. Requiring intent to harm the bank only makes it more difficult to prosecute bank fraud. *Nkansah*, 699 F.3d at 759 (Lynch, J., concurring); *see also Loughrin*, 134 S. Ct. at 2395 n.9 (citing *Nkansah* concurrence with approval).

The Court in *Loughrin* held that § 1344(2) does not require intent to defraud a bank because the plain language of that section includes no such requirement. 134 S. Ct. at 2389-2390. We similarly decline to read an additional element into § 1344(1) that Congress did not include; that does not serve the Congressional purpose; and that could needlessly entangle judges and juries in the intricacies of banking law. The district court correctly refused instructions that included such a requirement.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LAWRENCE EUGENE SHAW, Defendant-Appellant.	No. 13-50136 D.C. No. 2:12-cr-00862-JFW-1 Central District of California, Los Angeles ORDER (Filed Jun. 8, 2015)

Before: SCHROEDER, PREGERSON, and NGUYEN, Circuit Judges.

The panel has voted to deny Appellant's petition for panel rehearing. Judges Pregerson and Nguyen have voted to deny the petition for rehearing en banc, and Judge Schroeder has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for panel rehearing and petition for rehearing en banc are denied. Further petitions for rehearing and rehearing en banc shall not be entertained.

Supreme Court, U.S.
FILED
JUN 27 2016
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No. 15-5991

In The Supreme Court of the United States

LAWRENCE EUGENE SHAW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, for purposes of clause (1) of the bank-fraud statute, 18 U.S.C. § 1344, knowingly executing a scheme "to defraud a financial institution" requires proof of an intent to deceive and cheat a bank – in other words, that the defendant's objective in devising the scheme was to obtain bank-owned property by deceiving that victim bank.

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BRIEF FOR THE PETITIONER

Petitioner Lawrence Eugene Shaw respectfully requests that the Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the court of appeals is published at *United States v. Shaw*, 781 F.3d 1130 (9th Cir. 2015). J.A. 40-55. The district court issued no relevant written decisions.

JURISDICTION

The court of appeals entered its judgment on March 27, 2015. J.A. 40. On June 8, that court denied Shaw's timely petition for rehearing en banc. J.A. 56. Shaw then filed a timely petition for a writ of certiorari on September 4, which this Court granted on April 25. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

18 U.S.C. § 1344 provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a financial institution; or

> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE

Lawrence Shaw was convicted of bank fraud under 18 U.S.C. § 1344(1), which requires the intent to defraud a financial institution. J.A. 12-17, 26-27, 42. The indictment alleged that he executed a scheme to defraud Bank of America ("BofA") and Washington Mutual Bank ("WaMu") by engaging in specified financial transactions involving those banks and PayPal, an online payment and money-transfer service. J.A. 12-16, 42: R. 349.[1] The target of Shaw's scheme was Stanley Hsu, who had an account with BofA. J.A. 13. Shaw has never disputed that he deceived BofA and WaMu as part of his scheme to get Hsu's money via PayPal.[2] The issue in this case is whether the intent to deceive a bank was enough to convict Shaw under § 1344(1) or

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[1] "R." refers to the appellant's excerpts of record electronically filed in the court of appeals on October 16, 2013 (Docket No. 8).

[2] PayPal is not a "financial institution" for purposes of § 1344. R. 377. *See* 18 U.S.C. § 20 (defining "financial institution").

whether the government also had to prove that he intended to take bank-owned property by deceiving that victim bank.

I. Factual Background.

Stanley Hsu lived in Taiwan but had the statements for his BofA account mailed to a California home where Shaw happened to reside. J.A. 44; R. 322-26, 343-44, 581-85, 588. Using the information in these statements, Shaw devised and implemented a scheme to obtain Hsu's money. J.A. 44.

First, Shaw created a Hsu email account and used it to open a PayPal account in Hsu's name. J.A. 44; R. 327-29, 349-50, 358, 377-78, 524-25. Shaw then linked that PayPal account to Hsu's BofA account, which he accomplished despite PayPal's security measures because he had access to the bank statements. J.A. 44; R. 354-56, 378. Shaw also opened accounts in his father's name at WaMu. J.A. 44-45; R. 497, 589. He linked some of these accounts to the Hsu PayPal account. J.A. 45; R. 356-57. Although PayPal flagged that as suspicious, Shaw convinced PayPal that he was Hsu by providing falsified documents. J.A. 45; R. 357-60, 379-81, 512-14.

With these tools in place, Shaw siphoned Hsu's money from his BofA account through outgoing transfers to the PayPal account. J.A. 45; R. 361, 378-79, 495-97. Shaw then made purchases using the PayPal account; he also moved the PayPal money through the WaMu accounts in his father's name before ultimately

writing checks to himself, transferring funds to another WaMu account in his own name, or otherwise using the money for his benefit. J.A. 45-46; R. 361-65, 402-07, 436-38, 497-510. Shaw took about $300,000 of Hsu's money over four months before his scheme was discovered. J.A. 46; R. 326, 336, 342, 497

It was undisputed at trial that neither BofA nor WaMu lost any money because of Shaw's scheme. J.A. 46; R. 434-35, 573-74, 615. Pursuant to standard bank policies, BofA returned to Hsu the money taken by Shaw in the 60 days before Hsu reported the unauthorized withdrawals. J.A. 46; R. 336-40, 614-15. But the source of these funds was PayPal, which had to "auto-reverse" those money transfers back to BofA. J.A. 46; R. 387-89, 392-95, 573-74, 613-15.[3] Even if BofA had sought additional auto-reversals from PayPal for withdrawals outside of the 60-day period, the source of any funds thereby returned to Hsu would also have been PayPal, not BofA. R. 388-89, 392-93.

As for WaMu, it would have reimbursed a customer for unauthorized activity reported within two months if the customer was a "true victim." R. 426-30, 445. Because its only affected customer (Shaw) was not a victim, WaMu returned the limited ill-gotten funds still in Shaw's fraudulent accounts to PayPal, but the bank did not compensate PayPal (or anyone else) for the money already disbursed from those accounts. R.

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[3] Given that the source of the money returned to Hsu via BofA was PayPal, the Ninth Circuit described the "auto-reversals" inaccurately as "reimburse[ments]." J.A. 46.

389-90, 434-35. And because PayPal is not a bank, it could not seek auto-reversals from WaMu. R. 389-91.

Thus, Hsu and PayPal bore the entire loss caused by Shaw's scheme. J.A. 46; R. 336-39, 387, 389, 391-92, 434-35, 561-62, 573-74, 615.

II. The District Court Proceedings.

The bank-fraud statute, 18 U.S.C. § 1344, defines two crimes: clause (1) prohibits knowingly executing a scheme "to defraud a financial institution," and clause (2) applies to a scheme to obtain property "owned by, or under the custody or control of, a financial institution" by means of a false statement. Shaw was charged with violating clause (1). J.A. 12-16.

Shaw asked the district court to instruct the jury that the requisite intent to defraud existed if he intended to both deceive a bank *and* cheat that bank by exposing that bank, not just Hsu, to monetary loss. J.A. 22-25, 47. He also asked the court to instruct that the jury could convict only if it found that a particular bank was both the target of his deception and an intended victim of the fraud. J.A. 23-24, 47. Shaw acknowledged that actual bank loss is not an element of bank fraud, but he maintained that an *intent* to cause bank loss is required to establish an intent "to defraud a financial institution" for purposes of clause (1). R. 624-25.

Shaw did not dispute that he devised and implemented the above-described scheme, or that his

scheme would constitute bank fraud under clause (2) of § 1344. R. 315, 410, 631, 644, 646. Rather, his defense was that, given the distinct crimes covered by § 1344's two provisions, his scheme did not constitute bank fraud under clause (1). R. 624-25, 642-51. He therefore moved for a judgment of acquittal on those grounds. R. 610, 622-24.

The district court acknowledged that Shaw's motion for a judgment of acquittal and his requested jury instructions hinged on his interpretation of § 1344(1). R. 622-26. Because it rejected that interpretation, the district court refused to give Shaw's instructions. J.A. 48; R. 636-41, 648-51. Instead, it told the jury that "'scheme to defraud' means any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, *or* deprive a financial institution of something of value." J.A. 18 (emphasis added); *see also* J.A. 48; R. 725. Consistent with this disjunctive definition of the "scheme," the court also defined "intent to defraud" disjunctively in a separate instruction as "intent to deceive *or* cheat." J.A. 19 (emphasis added); *see also* J.A. 49; R. 726.

The jury convicted Shaw on 14 counts of § 1344(1) bank fraud. J.A. 49; R. 737-40.[4]

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[4] The indictment alleged 17 counts of clause (1) bank fraud. J.A. 12-16. The government dismissed one count before trial. R. 163. And the jury acquitted on two counts pertaining to transactions that were not clearly traceable to the fraudulent scheme. R. 703-04, 739-40.

III. The Court of Appeals' Decision.

On appeal, the Ninth Circuit noted the significant differences between the instructions requested by Shaw and those given by the district court, including that Shaw argued that "intent to defraud" means "intent to deceive *and* cheat" the bank whereas the district court instructed the jury that it means "intent to deceive *or* cheat" the bank. J.A. 42-43, 46-49 (emphasis added). The court affirmed Shaw's convictions under the disjunctive instructions. J.A. 44, 55.

The Ninth Circuit identified the question as whether the intent to defraud the bank required under § 1344(1) "means the government must prove the defendant intended the bank to be the principal financial victim of the fraud." J.A. 42. It acknowledged that bank *customer* Stanley Hsu – not a bank – was a, if not the, principal intended financial victim of Shaw's scheme. J.A. 42-43, 51.

The Ninth Circuit rejected Shaw's argument that § 1344(1) requires proof that the defendant intended the bank to be the financial victim of the fraud (in other words, the intended bearer of the loss). J.A. 51. "The language of neither clause of the statute," the court wrote, "refers to monetary loss or to the risk of such loss." J.A. 51. Rather, the statute's "language focuses on the intended victim of the deception, not the intended bearer of the loss." J.A. 51. The court then explained that clause (1) requires the intent to deceive the bank and clause (2) requires false or fraudulent representations or pretenses to third parties, but

"[n]either clause requires the government to establish the defendant intended the bank to suffer a financial loss." J.A. 51. Although it acknowledged that the circuits are divided on how to interpret the statute, the Ninth Circuit relied on its precedent to hold that "§ 1344(1)'s element of intent 'to defraud' . . . does not include intent to financially victimize the bank." J.A. 43, 51-54. The court did not define "defraud" in general, or "defraud a financial institution" in particular, before reaching this conclusion. J.A. 49-55.

The Ninth Circuit believed that its holding was consistent with this Court's decision in *Loughrin v. United States*, 134 S. Ct. 2384 (2014), which interpreted clause (2) of § 1344. J.A. 43-44, 49-51, 53-55. The court of appeals wrote that *Loughrin* confirmed its "conclusion that the difference between the two clauses is which entity the defendant intended to deceive, not which entity the defendant intended to bear the financial loss." J.A. 53. The court also pointed to *Loughrin*'s rejection of a risk-of-loss element. J.A. 54 (citing *Loughrin*, 134 S. Ct. at 2395 n.9). In doing so, however, the Ninth Circuit improperly characterized the *actual*-risk-of-loss element at issue in *Loughrin* as "similar" to Shaw's entirely distinct *intent*-to-cause-loss argument. J.A. 53-55.

Given its interpretation of § 1344(1), the Ninth Circuit held that the district court correctly refused Shaw's request for an instruction that "intent to defraud" means "intent to deceive *and* cheat." J.A. 47 (emphasis added), 55. It found no error in the district court's contrary instruction that "[a]n intent to defraud

is an intent to deceive *or* cheat." J.A. 49 (emphasis added), 55. Indeed, that is the court's *model instruction* defining "intent to defraud." *Ninth Circuit Manual of Model Criminal Jury Instructions* § 3.16 (2010 ed.).

SUMMARY OF ARGUMENT

The federal bank-fraud statute, 18 U.S.C. § 1344, defines different, though overlapping, crimes in two separate clauses. The Court construed clause (2) of the statute in *Loughrin v. United States*, 134 S. Ct. 2384 (2014). This case concerns clause (1), which punishes knowingly executing a scheme or artifice "to defraud a financial institution[.]"

Lawrence Shaw was convicted of clause (1) bank fraud based on a scheme to take a bank customer's money from his account by deceiving banks. Unlike clause (2), clause (1) requires, as its "whole sum and substance," that a defendant intend to "defraud a financial institution[.]" *Loughrin*, 134 S. Ct. at 2389-90. The question here is what that element means.

I. This question is answered by clause (1)'s text. Intent to defraud a financial institution requires that the defendant's objective in devising the scheme be to deceive and cheat a bank – that is, to obtain a bank's *own* property by deceiving that bank. It is not enough that the defendant intend to obtain non-bank property in the custody and control of the bank, such as bank-customer money. This plain-meaning interpretation is confirmed by § 1344's structure and legislative history.

A. The Ninth Circuit's decision is at odds with the plain language of clause (1).

A.1. The gravamen of the crime is the scheme "to defraud" itself, and thus the defendant's intent in devising the scheme, rather than the completed fraud. In over a century of jurisprudence, this Court has interpreted "defraud" in accordance with its common and ordinary meaning to signify wronging a victim *in his property rights* by deceit. In contravention of this settled meaning, which Congress is presumed to have employed, the Ninth Circuit affirmed Shaw's convictions under jury instructions that failed to require proof of an intent to deprive a bank (or anyone else) of a property right.

A.2. Clause (1) applies only to schemes to "defraud *a financial institution*." The statute thus textually specifies the requisite intended victim of the scheme – a bank – unlike the mail- and wire-fraud statutes on which it was modeled. Basic grammar rules dictate that the settled definition of the verb "defraud" applies to the direct object of that verb ("a financial institution"). Clause (1) therefore requires an intent to wrong a bank *in its property rights* by deceiving that bank. This Court has construed similar statutory language designating the requisite victim of a fraudulent scheme to require that the defendant target that victim *itself*, and not a third party. The same analysis applies here. Contrary to the Ninth Circuit's conclusion, clause (1)'s unambiguous text applies only to schemes designed to obtain the bank's *own* property.

B. Read as a whole, the bank-fraud statute's two provisions have notable textual differences that support the plain-meaning interpretation of clause (1). Clause (2) lacks clause (1)'s intent-to-defraud-a-bank requirement and differentiates expressly between schemes designed to obtain bank-*owned* and bank-*held* property, extending its reach to both types of schemes (provided the requisite means of a false statement). This broad language makes clause (2) applicable to a range of property interests present in banking relationships. A scheme, like Shaw's, designed to obtain money in a customer's account targets property under the "custody or control" of the bank and is covered by clause (2). Because it is not a scheme to obtain bank-owned property, it is not covered by clause (1).

Clause (1) dispenses with clause (2)'s false-statement requirement and is conspicuously devoid of its breadth as to the property schemes described. No basis exists for reading clause (2)'s text explicitly covering schemes to obtain bank-held property into clause (1). Rather, interpreted in accordance with its plain language, § 1344 is coherent and comprehensive in sweep.

C. Because the text is clear and the statutory scheme is coherent, the Court need not consider § 1344's history. Nonetheless, that history supports the plain-meaning interpretation of clause (1).

C.1. Section 1344 was enacted following three decisions of this Court that exposed gaps in the legislative scheme for prosecuting particular crimes against banks. Check kiting – which misleads banks to

obtain their money – was a major concern, as were stolen-credit-card schemes and certain bank-larceny offenses. These crimes map onto the plain-meaning interpretation of § 1344. Check kiting is the quintessential clause (1) crime, and the latter types of schemes are covered most clearly under clause (2). It is consistent with Congress's focus on check kiting that it devoted clause (1) to the protection of banks from schemes that unambiguously target bank-*owned* property.

C.2. Legislative pronouncements also reflect Congress's intent to adopt the Court's jurisprudence interpreting "scheme or artifice to defraud" and to protect banks from schemes in which the bank *itself* is the financial victim of the fraud. Moreover, in conjunction with clause (2)'s different, broad language covering two types of property schemes, the plain-meaning interpretation of clause (1) comports with § 1344's purpose to reach a wide range of bank fraud.

D. Applying the rule of lenity, the Court has construed other federal fraud statutes narrowly. Therefore, to the extent there is any ambiguity concerning the scope of clause (1), the Court should do the same here.

II. Clause (1) applies only to schemes to obtain bank-owned property by deceiving that bank, and clause (2) covers schemes to obtain bank-owned or bank-held property by means of a false statement. Interpreted this way, any conduct that constitutes true

bank fraud will be chargeable, and provable, under § 1344.

If a defendant intends to obtain bank-owned property by deceiving that bank, and does so by means of a false statement to the bank, he can be charged under either clause (1) or clause (2) (or both). Other crimes, like check kiting, can only be brought under clause (1). But the requisite intent for clause (1) is clear in check-kiting cases because such schemes unambiguously target a bank's own property. The same is true for loan fraud and bank embezzlement. In contrast, where a scheme does not reflect an intent to obtain bank-owned property, but targets bank-held property, the defendant may be prosecuted under clause (2) instead.

Had the government followed the appropriate course by charging Shaw under clause (2), its task would have been straightforward. But where, as here, the government charges a clause (2) scheme under clause (1), it *invites* a higher evidentiary burden. Given clause (2), there is no need to stretch clause (1) beyond its plain meaning – even if the Court were permitted to do that.

ARGUMENT

The federal bank-fraud statute, 18 U.S.C. § 1344, criminalizes the knowing execution, or attempted execution, of two kinds of schemes:

> [A] scheme or artifice –
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises[.]

The Court recently interpreted this statute in *Loughrin v. United States*, 134 S. Ct. 2384 (2014), which addressed whether clause (2) requires proof that the defendant intended to defraud a financial institution. *Id.* at 2387. The Court held that it does not. *Id.* The statute's two clauses define separate, though overlapping, crimes. *Id.* at 2388-92 & n.4. It is clause (1), not clause (2), that requires proof of intent to defraud a financial institution – indeed, that is its "whole sum and substance." *Id.* at 2389-90.

Lawrence Shaw was convicted of clause (1) bank fraud, and this case concerns what it means to intend to "defraud a financial institution" for purposes of that provision. The Ninth Circuit affirmed his convictions under instructions that defined intent to defraud as "intent to deceive *or* cheat" a financial institution, thereby permitting a guilty verdict based solely on an intent to deceive a bank. J.A. 49 (emphasis added), 55. Moreover, it held that the requisite intent to defraud does not include "intent to financially victimize the bank." J.A. 43, 51-55.

The Ninth Circuit's decision is at odds with the text of the statute. A defendant has the intent required by clause (1) only if his objective in devising the scheme is to obtain a bank's *own* property – not that of a non-bank third party – by deceiving that bank. Construed in this manner, clause (1) complements clause (2), such that any conduct properly characterized as bank fraud will be covered by § 1344.

I. Under clause (1) of the bank-fraud statute, 18 U.S.C. § 1344, the requisite intent "to defraud a financial institution" means the intent to deceive and cheat a bank – in other words, that the defendant's objective in devising the scheme to defraud was to obtain bank-owned property by deceiving that victim bank.

The plain language of clause (1) requires proof that the defendant intended to deceive and cheat a bank.[5] Put differently, the defendant's objective in devising the scheme to defraud must be to obtain bank-owned property by deceiving that victim bank.[6] The

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[5] Section 1344 uses the term "financial institution," which is defined to include a variety of institutions, including FDIC-insured banks. 18 U.S.C. § 20. Here, "bank" is used as shorthand for "financial institution."

[6] As explained in the Statement of the Case, Shaw's scheme targeted funds in a bank customer's account, so the only property at issue here is money. The scheme involved neither "intangible property" nor the kind of "honest services" fraud covered by 18 U.S.C. § 1346, as interpreted by *Skilling v. United States*, 561 U.S. 358 (2010). Therefore, for present purposes, the scheme to defraud

structure of § 1344, which defines two separate crimes and distinguishes, in clause (2), between two kinds of property, supports this interpretation of clause (1). And the statute's legislative history, to the extent that it is relevant, buttresses the plain-language construction. Finally, if any ambiguity remains, the rule of lenity requires construing clause (1) in defendants' favor.

A. The plain text of clause (1) requires the intent to deceive a bank and to target that bank's property.

Statutory interpretation begins with the text. *Ross v. Blake*, ___ S. Ct. ___, 2016 WL 3128839, *5 (2016). Here, the relevant language is "scheme or artifice . . . to defraud a financial institution[.]" 18 U.S.C. § 1344(1).[7] The gravamen of the crime is the scheme

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is defined as a scheme to obtain bank-owned *property* by deceiving that bank.

[7] The text at issue here has not changed materially since § 1344 was enacted. Originally, the statute included two subsections. Subsection (a) contained the core text of the current statute, except it used the phrase "a federally chartered or insured financial institution" instead of "a financial institution," as it does now. Subsection (b) defined "a federally chartered or insured financial institution." Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, § 1108(a), 98 Stat. 1837, 2147. Later, Congress designated subsection (a) as the entire statute, replaced "federally chartered or insured financial institution" with "financial institution," eliminated subsection (b), and changed the maximum penalties. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, Title IX, § 961(k), 103 Stat. 183, 500. The same act added 18 U.S.C. § 20, which now defines "financial institution." *Id.* § 962(e), 103 Stat. 503-04. The following year, Congress once again increased the penalties in § 1344. Crime

itself, not the completed fraud. *Loughrin*, 134 S. Ct. at 2395 n.9 (citing *Neder v. United States*, 527 U.S. 1, 25 (1999)).[8] Thus, the scheme's objective – the defendant's intent – is the crux of clause (1). *Id.* at 2389-90.[9]

To determine how to define the requisite intent, the Court must therefore consider what constitutes a scheme to defraud a bank. The Court has long interpreted "defraud" consistent with its common and ordinary meaning to signify wronging a victim in his *property rights* by deceit. The term's focus on the victim's property rights is important because clause (1) applies only to schemes to "defraud *a financial institution*." Given this textual specification of a particular victim – the bank – basic rules of grammar require applying the settled definition of "defraud" to that specific victim. It follows that a scheme to defraud a bank is a scheme to obtain the intended victim bank's *own* property by deceiving that bank.

Control Act of 1990, Pub. L. No. 101-647, Title XXV, § 2504(j), 104 Stat. 4789, 4861. There have been no other amendments to the statute.

[8] Given the focus of § 1344 on the *scheme* rather than the completed fraud, the government need not prove actual damages, or risk of financial loss, under either clause. *See Loughrin*, 134 S. Ct. at 2395 n.9 (citing *Neder*, 527 U.S. at 24-25). Consequently, clause (1), like clause (2), "avoid[s] entangling courts in technical issues of banking law about whether the financial institution or, alternatively, a depositor would suffer the loss from a successful fraud." *See id.* It is the *object* of the scheme described in each part of § 1344 – not whether a bank in fact owns the property or suffers a loss – that controls whether a case is properly brought under clause (1) or clause (2).

[9] "Scheme" is used as shorthand for "scheme or artifice."

1. The Court has interpreted "defraud" to mean wronging a victim in his property rights by deceit.

Section 1344 was enacted in 1984. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Title II, § 1108(a), 98 Stat. 1837, 2147. It was modeled on the mail- and wire-fraud statutes (18 U.S.C. §§ 1341, 1343). *Loughrin*, 134 S. Ct. at 2391; *Neder*, 527 U.S. at 20-21. But the scheme-to-defraud language found in clause (1) predates those statutes. It first appeared in the 1872 predecessor to the mail-fraud statute. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323.[10] In over a century of jurisprudence interpreting § 1344's predecessor statutes, the Court has construed "defraud" consistent with its common and ordinary meaning to signify wronging a victim in his property rights by deceit. The settled meaning of this term applies here.

Congress enacted the original mail-fraud statute to protect "property rights" from frauds undertaken "'for the purpose of deceiving *and fleecing*'" innocent people. *McNally v. United States*, 483 U.S. 350, 356 & n.5 (1987) (quoting Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth)) (emphasis added); *see also Durland v. United States*, 161 U.S. 306, 314 (1896) (mail-fraud statute's purpose was protection of public against "intentional efforts *to despoil*" by

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[10] This statute made it a misdemeanor for "any person having devised or intending to devise any scheme or artifice to defraud" to use the mail in "executing such a scheme or artifice (or attempting so to do)[.]" *Id.*

use of mail) (emphasis added). Consistent with this purpose, when the Court first interpreted the statute, it construed the phrase "scheme or artifice to defraud" "broadly insofar as property rights are concerned[.]" *McNally*, 483 U.S. at 356 (discussing *Durland*).

Subsequently, in *Fasulo v. United States*, 272 U.S. 620 (1926), the Court held that a scheme to obtain money by threating to injure or kill the victim was not a scheme to defraud for purposes of the mail-fraud statute because the property was obtained from the victim by intimidation. *Id.* at 627-29. In so holding, the Court applied the common meaning of "defraud," as set forth in *Hammerschmidt v. United States*, 265 U.S. 182 (1924), which stated that the term ordinarily signifies "the deprivation of something of value by trick, deceit, chicane, or overreaching" or, put differently, "wronging one in his property rights by dishonest methods or schemes." *Id.* at 188;[11] *see also United States v. Cohn*,

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[11] *Hammerschmidt* concerned the scope of the predecessor of 18 U.S.C. § 371, which prohibits any conspiracy "to defraud the United States, or any agency thereof in any manner or for any purpose[.]" The Court held that while "[t]o conspire to defraud the United States means primarily to cheat the Government out of property or money it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest." *Id.* The Court later concluded "that this broad construction of § 371 is based on a consideration not applicable to the mail fraud statute" – namely, that § 371 is a statute designed to protect the federal government, which exists to administer itself in the interest of the public. *McNally*, 483 U.S. at 358 n.8. Because the mail-fraud statute had its origin in the desire to protect individual property rights, by contrast, any benefit "the Government derives from the statute

270 U.S. 339, 346 (1926) ("primary sense" of "defraud" is "cheating" victim "out of property or money"). Based on *Hammerschmidt*'s ordinary-meaning definition of "defraud," the Court agreed that the words "to defraud" "*show unmistakably that the victim's money must be taken from him by deceit.*" *Fasulo*, 272 U.S. at 627-28 (citing with approval *Naponiello v. United States*, 291 F. 1008, 1009 (7th Cir. 1923)) (emphasis added).

Congress enacted § 1344 after a trio of decisions by this Court left gaps in the legislative scheme for punishing frauds against banks. *See infra* Part I.C.1. A few years later, in *McNally v. United States*, the Court held that "scheme or artifice to defraud" did not encompass schemes to defraud the people of their intangible right to honest and impartial government. 483 U.S. at 358-60. Applying *Hammerschmidt*'s definition of "defraud" once again, the Court underscored that the common meaning of "defraud" refers "to *wronging one in his property rights* by dishonest methods or schemes[.]" *Id.* at 358 (internal quotation marks omitted) (emphasis added). Nothing in the statute's history or text supported extending its reach to crimes other than "frauds involving money or property." *Id.* at 358-60.[12]

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must be limited to the Government's interests as property holder." *Id.*

[12] Congress responded to *McNally* by enacting 18 U.S.C. § 1346, which defines "scheme or artifice to defraud" for purposes of the federal fraud statutes to include "a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508. But even after that, the Court interpreted this statute narrowly to "criminalize *only* the bribe-and-kickback

Thereafter, the Court continued to apply *Hammerschmidt* to interpret the scheme-to-defraud language and to reaffirm *McNally*'s holding that, construed in accordance with its common and ordinary meaning, the phrase is limited to the protection of property rights. *See Cleveland v. United States*, 531 U.S. 12, 15, 19-20 (2000) (mail-fraud statute did *not* apply to scheme to obtain a state license because "the thing obtained must be property in the hands of the victim"); *Carpenter v. United States*, 484 U.S. 19, 25-27 (1987) (mail- and wire-fraud statutes applied to confidential business information because such information "has long been recognized as property"); *see also Pasquantino v. United States*, 544 U.S. 349, 354-57 (2005) (wire-fraud statute applied to scheme to deprive Canada of excise taxes because the right to collect such taxes is property).

Because Congress modeled § 1344 on the mail- and wire-fraud statutes, the Court must presume that Congress was aware of the Court's precedent interpreting "scheme or artifice to defraud" at the time it enacted the bank-fraud statute and intended the same language to be interpreted in the same way. *See Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) (when Congress transplants a term from another legal source, whether common law or other legislation, it presumably knows and adopts the settled meaning of that term); *see also Husky Int'l Electronics, Inc. v. Ritz*,

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core of the pre-*McNally* case law" in the courts of appeals. *Skilling*, 561 U.S. at 409 (emphasis in original). As discussed *supra* note 6, no such scheme is at issue in this case.

136 S. Ct. 1581, 1587 (2016) (no need to define "fraud" for "all times and all circumstances" where courts and legislatures have used term in a specific way for purposes of a given statutory scheme). Consistent with this precedent, the government concedes that a "scheme to defraud" a bank requires proof of an intent to deprive the bank of something of value by deception. Brief in Opposition at 11.[13] Thus, there is no reason to deviate from the settled meaning of "defraud" here. *See Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 205 (1991) (stare decisis "most compelling" where "pure question of statutory construction" is involved); *see also Cleveland*, 531 U.S. at 26 (citing *Hilton* when reaffirming *McNally*'s interpretation of mail-fraud statute).

Despite this settled meaning, the Ninth Circuit affirmed Shaw's convictions under its model jury instruction defining "intent to defraud" as "intent to deceive *or* cheat." J.A. 19 (emphasis added), 49, 55; *Ninth Circuit Manual of Model Criminal Jury Instructions* § 3.16 (2010 ed.). Moreover, its model instructions have since been updated not only to reaffirm that definition but to also endorse the additional instruction given by the district court in this case that, for purposes of § 1344(1), "[t]he phrase 'scheme to defraud' means any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, *or* deprive a financial institution of something of value." J.A.

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[13] The government does dispute that a defendant must intend to obtain the bank's *own* property, however. Brief in Opposition at 11. That issue is addressed below.

18 (emphasis added), 48; *Ninth Circuit Manual of Model Criminal Jury Instructions* § 8.125 (2010 ed. as updated in June 2015). Given the disjunctive language of these instructions, a jury may convict a defendant under clause (1) based solely on an intent to deceive a bank, without finding any intent to deprive that bank (or anyone else for that matter) of property. Such instructions cannot be reconciled with the plain meaning of "defraud." This error alone requires reversal of the court of appeals' judgment.

2. Because clause (1) applies the verb "defraud" to a direct object ("a financial institution"), the text requires the intent to wrong a bank in its property rights by deceiving that victim bank.

In § 1344(1), the term "defraud" is immediately followed by the phrase "a financial institution." Because defraud means wronging a victim in his property rights by deceit, the plain language of clause (1) requires an intent to wrong a victim bank *in its property rights* by deceiving that bank. The bank – not its customer – must be the intended victim of the fraudulent scheme.

One significant difference between the bank-fraud statute and its predecessors is that the mail- and wire-fraud statutes punish a scheme to defraud generally, without specifying the requisite object of the fraud. *See* 18 U.S.C. §§ 1341, 1343. The absence of a direct object

means that the mail- and wire-fraud statutes cover schemes to defraud *anyone* – whether the property owner is an individual, a public or private entity, or a financial institution – provided use of the specified instrumentality (mail or wires). Congress could have drafted § 1344 the same way, punishing a scheme to defraud anyone, provided the scheme used a bank. It did not do that.

Instead, Congress departed from the text of the mail- and wire-fraud statutes by designating the requisite object of the scheme to defraud. It limited clause (1) to frauds that target "a" – singular – "financial institution." Ordinary rules of grammar require that the direct object – "a financial institution" – be the entity that receives the action of the verb – "defraud." *See* Martha Kolln, *Understanding English Grammar* 396 (4th ed. 1994) ("The direct object names the objective or goal or the receiver of the verb's action[.]"); Robert Funk et al., *The Elements of Grammar for Writers* 115 (1991) ("direct object" is noun that receives verb's action). Consequently, to come within the sweep of clause (1), the subject (the defendant) must do the verb (defraud) *to the direct object* (a bank). *See Flora v. United States*, 362 U.S. 145, 150 (1960) (ordinary principles of English grammar are relevant when interpreting a statute).

Because the settled meaning of "defraud" is wronging a victim in his property rights by deceit, a scheme "to defraud *a financial institution*" is, by extension, a scheme to obtain a bank's *own* property by deceiving that victim bank. Therefore, a defendant has

the intent "to defraud a financial institution" only if his intended victim is a financial institution *itself*. Reading clause (1) to include schemes designed to obtain a bank *customer's* property rather than a bank's *own* property deviates from the statute's plain text and ordinary syntax, which requires the verb to act upon the direct object. *See Department of Housing and Urban Development v. Rucker*, 535 U.S. 125, 131 (2002) (rejecting interpretation of statute that ran counter to basic grammar rules).

When construing similar statutory language, this Court has repeatedly recognized the legal significance of Congress's decision to specify textually the object of the fraudulent scheme, requiring that the scheme alleged in fact target the specified victim's property. In other words, the intended fraud must be *against* the specified object. *See Bridges v. United States*, 346 U.S. 209, 221-22 (1953) (Wartime Suspension of Limitations Act applied only to offenses "defrauding or attempting to defraud the United States" – that is, "where fraud *against* the Government is an essential ingredient of the crime[,]" not merely where its effect was to cause the government loss) (emphasis added).

Thus, in *Tanner v. United States*, 483 U.S. 107 (1987), the Court held that defendants who conspired to defraud a private entity which received federal funding and was supervised by the government did not violate 18 U.S.C. § 371, which punishes conspiracies "to defraud the United States in any manner or for any purpose[.]" *Id.* at 128-32. The government had alleged a conspiracy to defraud the United States by impeding

the lawful functions of the government agency that supervised the private entity,[14] but argued on appeal that the private entity should be treated as "the United States" itself under these circumstances. *Id.* The Court rejected this interpretation as lacking "even an arguable basis in the plain language of § 371." *Id.* at 131. The government's construction, the Court explained, would have substituted the statutory language requiring that the object of the fraud be "the United States" with the phrase "anyone receiving federal financial assistance and supervision[.]" *Id.* at 132 (internal quotation marks omitted). In so holding, the Court emphasized that the conspiracies covered by § 371 "are defined not only by the nature of the injury intended by the conspiracy, and the method used to effectuate the conspiracy, but also – and most importantly – by the *target* of the conspiracy." *Id.* at 130 (emphasis in original). Thus, the convictions could stand only if the trial evidence established that the defendants conspired to make misrepresentations *to the United States* because such proof would establish that the United States *itself* – and not the private entity – was the target of the fraud. *Id.* at 132.[15]

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[14] As discussed *supra* note 11, the Court had previously interpreted § 371's statutory language to reach conspiracies that impair, obstruct, or defeat the lawful function of government, and the Court did not reconsider that aspect of § 371's scope in *Tanner*. *Id.* at 128.

[15] The government also charged the defendants with mail fraud for the scheme to defraud the private entity. *Id.* at 133. Because the mail-fraud statute punishes schemes to defraud *anyone*,

Over half-a-century earlier, the Court came to a similar conclusion in *United States v. Cohn*, when considering the scope of a statute that prohibited *inter alia* falsifying or concealing a material fact by any scheme "for the purpose and with the intent of cheating and swindling or *defrauding the Government of the United States*[.]" 270 U.S. at 343 (internal quotation marks omitted) (emphasis added). There, the government alleged that the defendant lied to U.S. customs officials (via brokers) and concealed material facts in order to fraudulently procure cigars that had arrived from abroad. *Id.* at 343-44. The cigars were admissible to the United States free of duty, although government regulations required that the defendant pay the third-party sellers for the merchandise before taking possession from the custom house. *Id.* at 344-45. Applying the "usual and primary" meaning of "defraud" as to cheat "out of property or money," the Court held that the statute related to the "fraudulent causing of pecuniary or property loss" to the United States. *Id.* at 346-47.[16] Because the merchandise was non-dutiable, the defendant's scheme did not constitute "defrauding" *the United States* within the meaning of the statute, even

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this theory of prosecution dispensed with proof that the target of the fraud was the United States (rather than the private entity).

[16] In so holding, the Court rejected the government's position that the statute should be construed, in accordance with 18 U.S.C. § 371, *see supra* note 11, to include not only the "primary" meaning of defraud the United States, but also in the "secondary sense" of interfering with or obstructing lawful government functions. *Id.*

though the defendant did not pay the third-party sellers. *Id.* at 346.

Finally, in *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 553 U.S. 662 (2008), the Court construed a provision of the False Claims Act, which prohibits conspiracies "to defraud *the Government* by getting a false or fraudulent claim allowed or paid." *Id.* at 672 (internal quotation marks omitted) (emphasis added). There, the plaintiffs brought *qui tam* actions under the Act, alleging fraud in the invoices subcontractors submitted for payment to private-entity shipyards, which had in turn contracted with the Navy to build destroyers. *Id.* at 665-67 The Court held that it was not enough for the plaintiffs to show that the subcontractors agreed upon a fraudulent scheme that "had the effect" of causing the shipyards to make payments to them using money obtained from the government pursuant to the contract. *Id.* at 672. Rather, the plaintiffs had to "show[] that the conspirators intended to defraud *the Government*" itself – not merely the third-party shipyards who paid the claims with government funds. *Id.* (internal quotation marks omitted) (emphasis added).

In each of these cases, the Court construed statutory language designating the victim of the conspiracy to defraud to require that the scheme target that victim *itself*, and not a third party. That the third-party-owned property targeted by the fraud in *Cohn* was in the government's custody did not convert the offense into a scheme to defraud *the government*. Likewise, that the third-party entity targeted by the fraud in *Allison Engine* made payments using the government's

money did not transform the offense into a scheme to defraud *the government*. The same analysis applies here. As in *Tanner*, the offenses covered by clause (1) of § 1344 "are defined . by the *target*" of the scheme: the bank. *See* 483 U.S. at 130 (emphasis in original). Put differently, the contemplated fraud must be *against* the bank. *Cf. Bridges*, 346 U.S. at 222. Thus, for purposes of clause (1), the intended target cannot be a non-bank third party. That a bank holds its customer's property in its "custody or control" does not transform a scheme that targets this bank-*held* property into a scheme to defraud *the bank*. The distinction between the bank *itself* – the designated object of the scheme – and its third-party customer does not dissolve because the bank maintains "custody or control" over its customer's money.

The plain language of clause (1) thus reaches only schemes that target "a financial institution" as the intended victim of the fraud. Given the settled meaning of "defraud," the defendant must therefore intend to obtain the bank's own property by deceit of that bank. Extending the statutory text to cover a financial institution's *customers* exceeds the unambiguous scope of the statute.

In this respect, too, the Ninth Circuit's decision rested on an interpretation of clause (1) that conflicts with its plain meaning. It held that "§ 1344(1)'s element of intent 'to defraud' . . does not include an intent to financially victimize the bank." J.A. 43, 51-55. Contrary to this conclusion, clause (1) itself establishes

that a *bank* is the required victim and that a defendant therefore cannot intend to "defraud" a bank without intending to wrong a bank in its own property rights.

B. The structure of § 1344 – which contains two clauses defining different crimes and distinguishes in clause (2) between two kinds of property – supports the plain-meaning interpretation of clause (1).

Section 1344's structure confirms that clause (1) requires the intent to obtain a bank's *own* property, and not its customer's. *See Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (statute's language cannot be construed in a vacuum; its words must be read in context and in light of their place in the overall statutory scheme).

As explained in the preceding section, § 1344(1) makes "a financial institution" the object of the verb "defraud," unlike the mail- and wire-fraud statutes on which it was modeled. But there is also an important structural difference between the bank-fraud statute and its predecessors. The bank-fraud statute defines two crimes in separate clauses, while the wire- and mail-fraud statutes define a single crime comprised of two phrases (schemes to defraud *and* to obtain money

or property by false pretenses) set forth in one sentence.[17] *Loughrin*, 134 S. Ct. at 2391. Whereas the second money-or-property phrase in the mail- and wire-fraud statutes merely clarifies that the first scheme-to-defraud phrase includes certain conduct, the bank-fraud statute's second clause is a structurally-separate provision which is on "equal footing" with clause (1) and does "independent work." *See id.* The result is that the mail- and wire-fraud statutes punish the "scheme to defraud" using specified means, while the bank-fraud statute punishes schemes (1) "to defraud a financial institution," and separately, (2) to obtain property *either* "owned by" *or* "in the custody or control of" a financial institution "by means of" a false representation.

The textual differences between § 1344's two distinct provisions support the plain-meaning construction of clause (1). In clause (2), Congress distinguished between schemes that target bank-owned property and those that target bank-held property, thereby acknowledging the material difference between the two types of schemes – a scheme to obtain property "owned by" a bank is not a scheme to obtain property "in the custody or control of" a bank. As the Court noted in *Loughrin*, clause (2) extends its reach to both, making express the provision's broad applicability to a wide

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[17] These statutes punish "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" uses the mail or wires "for the purpose of executing such scheme or artifice[.]" *See* 18 U.S.C. §§ 1341, 1343.

range of property interests present in banking relationships. 134 S. Ct. at 2395 n.9 (noting "the broad language in § 1344(2) describing the property at issue"). Although the Court used shorthand to describe the two kinds of property covered by clause (2) collectively as "bank property," it recognized that a defendant who targets money in a customer's account intends to obtain property under the "custody or control" of the bank. *Id.* at 2389, 2392. It follows that such a defendant does not intend to obtain property "owned by" the bank.

Clause (2) demonstrates that Congress not only recognized the distinction between schemes that target bank-owned property and those that target bank-held property, but also that it knew how to draft a statute that was broad enough to reach both. Clause (1) is devoid of clause (2)'s breadth. Had Congress intended clause (1) to apply to schemes that target bank-held as well as bank-owned property, it would have drafted clause (1) to mirror clause (2) in this respect, punishing schemes to obtain money or property "owned by" or "in the custody or control" of a financial institution by deceiving the bank. It did not do that. In the context of clause (2), Congress's choice is significant. *See Loughrin*, 134 S. Ct. at 2390 (when § 1344 uses particular language in one clause but not the other, Congress is presumed to intend a difference in meaning).

In drafting clause (1), Congress chose to use the phrase "defraud a financial institution." It thereby imported into the statute the established definition of "defraud" and departed from the mail- and wire-fraud

statutes to designate "a financial institution" as the requisite object of the fraud. Construing clause (1) to extend to bank-held as well as bank-owned property would effectively substitute the statutory language requiring that the intended victim of the scheme be "a financial institution" with the phrase "a financial institution or its *customer*." *Cf. Tanner*, 483 U.S. at 132. No basis exists for construing clause (1)'s unambiguous text to include schemes to obtain bank-held as well as bank-owned property, as explicitly differentiated in, and covered by, clause (2).

As discussed further below, *see infra* Part II, when the statute's two provisions are properly construed, § 1344 constitutes a "symmetrical and coherent regulatory scheme[.]" *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks omitted). Clause (2) dispenses with clause (1)'s intent-to-defraud-a-bank requirement, reaching any scheme to obtain bank-held *or* bank-owned property (provided the requisite means). Clause (1) dispenses with clause (2)'s false-statement requirement, reaching any scheme to obtain bank-owned property by deceiving that bank. In this way, the two parts fit "into an harmonious whole," working together to provide a comprehensive sweep for the statute. *See id.* (internal quotation marks omitted).

C. The legislative history of § 1344 also supports the plain-meaning interpretation of clause (1).

Where, as here, the text of the statute is unambiguous and the statutory scheme is "coherent and consistent," the Court's inquiry should go no further. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1895 (2013) (internal quotation marks omitted). It must simply interpret the statute in accordance with its plain meaning. *Id.* at 1895-96. The Court therefore need not delve into § 1344's legislative history. *United States v. Woods*, 134 S. Ct. 557, 567 n.5 (2013) (regardless of whether legislative history is ever relevant, it need not be consulted when statutory text is clear); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (the Court does not "resort to legislative history to cloud a statutory text that is clear"). If the Court does so, however, it will find that the background of the statute and legislative pronouncements about its purpose support reading clause (1) to cover only schemes designed to take bank-owned property by deceiving that bank.

1. Congress enacted the bank-fraud statute to fill specific gaps in legislation, and the plain-meaning interpretation of clause (1), coupled with the Court's prior interpretation of clause (2), achieves that purpose.

Congress enacted § 1344 in the wake of three decisions of this Court that exposed particular "gap[s] . . . in Federal jurisdiction over frauds against banks[.]"

S. Rep. No. 98-225, at 377-78 (1983) ("*Senate Report*"); *see also* H.R. Rep. No. 98-901, at 2-3 (1984) ("*House Report*"); *Loughrin*, 134 S. Ct. at 2391-92. The bank-fraud offenses of particular concern to Congress when it drafted § 1344 map onto clause (1), as interpreted herein based on its plain language, and clause (2), as interpreted by *Loughrin*.

Until the Court's decision in *United States v. Maze*, 414 U.S. 395 (1974), the government used the mail-fraud statute to prosecute schemes involving banks. *Senate Report* at 377; *House Report* at 2-3; *Loughrin*, 134 S. Ct at 2391-92. *Maze* affirmed the lower court's reversal of a § 1341 conviction where the defendant stole a third party's credit card and used it to obtain food and lodging. 414 U.S. at 396-97. To satisfy § 1341's mailing element, the government relied on post-purchase mailings between the merchants and the issuing bank. *Id.* at 396-97, 399. The Court held that these mailings were "directed to the end of adjusting accounts between" the parties that shouldered the loss of the scheme (namely, the third-party account holder, the motel proprietor, and the bank), but were not for the purpose of executing the scheme, as required by the mail-fraud statute. *Id.* at 402, 405. The Court reasoned that the defendant's only objective was to pay the bills using the third party's stolen credit card; his scheme thus "reached fruition when he checked out of the motel[.]" *Id.* at 402. There was no evidence that the defendant intended that the bank (as opposed to the bank customer) ultimately bear the loss – "[i]ndeed,

from his point of view, *he probably would have preferred to have the invoices . . . never mailed at all.*" *Id.* (emphasis added). *Maze* limited the use of the mail-fraud statute to prosecute bank fraud. *Senate Report* at 377-78; *House Report* at 3.

The government also relied on 18 U.S.C. § 1014, as an "alternative" to the mail-fraud statute, to prosecute a subset of bank schemes involving false statements. *Senate Report* at 378. That theory of prosecution ended, as to check-kiting schemes, with *Williams v. United States*, 458 U.S. 279 (1982). Section 1014 prohibits "'knowingly mak[ing] any false statement or report'" for the purpose of influencing the specified actions of a bank. *Id.* at 282 (quoting 18 U.S.C. § 1014). Although check kiting is directed at misleading banks to honor insufficient-fund checks, *Williams* held that § 1014 does not apply because such schemes do not involve the making of a "false statement." *Id.* at 280-82, 284. Technically, the Court reasoned, a check is not a factual assertion at all, and therefore cannot be characterized as "true" or "false." *Id.* at 284.

As a result of *Williams*, § 1014 could "no longer be applied to address one of the most pervasive forms of bank fraud, check kiting." *Senate Report* at 378; *see also House Report* at 2. Because of the crime's "magnitude," and the fact that *Williams* and *Maze* meant that the government "frequently encounter[ed] major check kiting schemes where there [was] no way to apply any federal criminal statute[,]" check kiting presented a major concern for the Department of Justice. *See*

Financial Bribery and Fraud: Hearing Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 4, 12 (1984) (testimony and statement of Victoria Toensing, Deputy Assistant Attorney General, Criminal Division).

Soon after *Williams*, the Court further restricted the options available to the government to prosecute crimes against banks. *Bell v. United States*, 462 U.S. 356 (1983), affirmed a bank-larceny conviction, 18 U.S.C. § 2113(b), based on a scheme in which the defendant opened a bank account with false identifying information, deposited a third party's stolen and altered check into the account, and withdrew the funds. *Id.* at 357-58. Section 2113(b) punishes "[w]hoever takes and carries away, with intent to steal or purloin," property "belonging to, or in the care, custody, control, management or possession" of a bank. *Id.* at 357-58 (internal quotation marks omitted). The Court held that bank larceny applied to offenses that obtained property from banks by false pretenses and not just common-law larceny – but only if the conduct involved "a taking and carrying away" of that property. *Id.* at 361.

After *Bell*, there was "an absence of coverage with respect to some types of fraud in the general bank theft statute . in which there is not a taking and carrying away[.]" *Senate Report* at 378 (internal quotation marks omitted); *see also House Report* at 2. Congress responded the following year with § 1344, clause (2) of which, like § 2113(b), distinguishes between bank-owned and bank-held property. *Compare* 18 U.S.C. § 2113(b) *with* 18 U.S.C. § 1344(2).

Under the bank-fraud statute, the false-statement fraud in *Bell* is covered most clearly by clause (2), irrespective of whether the scheme involves a completed "taking." *See Loughrin*, 134 S. Ct. at 2393 (clause (2) satisfied "most clearly" where defendant makes misrepresentation directly to bank). The stolen-credit-card scheme in *Maze* is, likewise, covered by clause (2), even though the mailings post-date the scheme. *See id.* at 2391-92 (comparing Loughrin's scheme to scheme in *Maze*). And the check-kiting scheme in *Williams* is covered by clause (1), notwithstanding that a check is not a false statement.

Indeed, following § 1344's enactment, check kiting became the quintessential clause (1) offense. *See Loughrin*, 134 S. Ct. at 2390 n.4. It is consistent with Congress's particular focus on check-kiting schemes – which mislead banks to obtain their property – that it devoted clause (1) to the protection of banks from schemes in which the bank itself (and not a third party) is the intended victim of the fraud.

2. Legislative pronouncements about the intended sweep of § 1344 are consistent with the plain-meaning interpretation.

Although the legislative history does not discuss the contemplated boundaries of each clause of § 1344, it evidences the intent to model the statute on its mail- and wire-fraud predecessors, and to incorporate this

Court's interpretation of the phrase "scheme to defraud," as well as the courts of appeals' pre-*McNally* disjunctive interpretation of those statutes to encompass two provisions with distinct sweeps. *See, e.g.*, *House Report* at 4 ("The section thus parallels the language of the current mail fraud and wire fraud statute ('scheme to defraud'), *and is intended to incorporate case law interpretations of those sections.*") (emphasis added); *Senate Report* at 378 (statute "modeled" on mail- and wire-fraud statutes as then "construed by the courts"); *Loughrin*, 134 S. Ct. at 2391 (timing of § 1344's enactment reflects that Congress adopted pre-*McNally* interpretation of relevant language).

Legislative pronouncements also reflect that the purpose of the statute was to protect banks from schemes in which the bank *itself* is the financial victim of the fraud. *See, e.g.*, *Senate Report* at 377 ("frauds against banks" implicate "a strong Federal interest in protecting *the financial integrity* of these institutions") (emphasis added); *House Report* at 2 (existing laws did "not extend to fraudulent schemes where banks are victims unless the specific elements of false statement or theft crimes are met"). It is consistent with this focus on banks as the financial "victims" of crime that Congress devoted clause (1) to the protection of banks from schemes that aim to obtain the bank's *own* property by deceiving that bank. This is particularly so given clause (2)'s different, "broad language . describing the property at issue[,]" *Loughrin*, 134 S. Ct. at 2395 n.9, which dispenses with the need to determine if the scheme was designed to obtain bank-owned

or bank-held property, just as clause (1) dispenses with the need to prove that a defendant's false statement was the mechanism inducing the bank to release money. Construed accordingly, the two provisions work in tandem to ensure that the statute "reach[es] a wide range of fraudulent activity[,]" like the mail- and wire-fraud statutes on which it was modeled. *See Senate Report* at 378.

Given this history, no basis exists for departing from the plain meaning of § 1344's text. *See Salinas v. United States*, 522 U.S. 52, 57 (1997) (only "most extraordinary showing of contrary intentions in legislative history will justify a departure from" plain meaning of statute) (internal quotation marks omitted).

D. If doubt remains, the Court should construe clause (1) in favor of lenity, as it has done with other fraud statutes.

Even if clause (1) is susceptible to a more expansive interpretation, any ambiguity concerning its scope should be resolved in favor of lenity. *See Cleveland*, 531 U.S. at 25; *see also United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) (rule of lenity required adopting "more defendant-friendly" of two plausible definitions).

Lenity is "especially appropriate" in construing the bank-fraud statute because § 1344 not only authorizes a maximum penalty of 30 years, but is also a predicate offense for other serious crimes (like its mail- and

wire-fraud predecessors). *See Cleveland*, 531 U.S. at 25 (mail fraud is a predicate for RICO, 18 U.S.C. § 1961(1), and the money-laundering statute, 18 U.S.C. § 1956(c)(7)(A)); *see also* 18 U.S.C. § 1028A(c)(5) (bank fraud is a predicate for aggravated identity theft, which has a two-year mandatory-minimum term).

Applying the rule of lenity, the Court has repeatedly chosen narrow interpretations when construing the federal fraud statutes. *See, e.g.*, *Skilling*, 561 U.S. at 410-11; *Cleveland*, 531 U.S. at 25; *McNally*, 483 U.S. at 360. It should take the same approach here. "If Congress desires to go further" and punish, under clause (1), schemes that aim only to deceive a bank, or those that aim to deceive a bank to obtain bank-held (rather than bank-owned) property, "it must speak more clearly than it has." *McNally*, 483 U.S. at 360.

II. Given the plain-meaning interpretation, any conduct that amounts to bank fraud will be chargeable, and provable, under clause (1), clause (2), or both.

For the foregoing reasons, clause (1) applies only to schemes to obtain bank-owned property by deceiving that bank, and clause (2) covers schemes to obtain bank-held or bank-owned property by means of a false statement. So construed, § 1344 is true to its text, structure, and history. It is also comprehensive in its reach. The two provisions work together to ensure that any scheme properly characterized as bank fraud will be chargeable, and provable, under the statute.

In *Loughrin*, the Court recognized that there is substantial overlap between § 1344's two clauses. 134 S. Ct. at 2390 n.4. Therefore, many bank-fraud crimes may support a conviction under either clause. If a defendant intends to obtain bank-owned property by deceiving that bank, and does so by means of a false statement to the bank, then he both defrauded a financial institution for purposes of clause (1) and engaged in conduct falling within the plain meaning of clause (2). Thus, in *United States v. Higgins*, 270 F.3d 1070 (7th Cir. 2001), the defendant presented a bad check to a bank along with an "elaborate tale" designed to obtain immediate credit without waiting for the check to clear. *Id.* at 1074. The court concluded that these facts were sufficient to support a conviction under either clause (1) or clause (2). *Id.*

There are cases that can only be brought under clause (1), however. For example, check kiting cannot be charged under clause (2) because such schemes do not involve false representations. *Loughrin*, 134 S. Ct. at 2390 n.4; *Williams*, 458 U.S. at 284. But these cases may be prosecuted under clause (1) because check-kiting schemes unambiguously target a bank and not a non-bank third party. Consequently, the scheme itself constitutes powerful circumstantial evidence of a defendant's *intent* to obtain bank-owned property. The reasonable inference, absent contrary evidence, is that the defendant intended to target *the bank's* property because that is what his scheme was designed to do.

Williams illustrates the point. There, the defendant executed a classic check-kiting scheme by engaging in a series of transactions to obtain bank-owned property. *Williams*, 458 U.S. at 280-82. First, he drew a check in excess of his account balance in one bank and deposited it in his account in the other; then he reversed the process between his accounts in order to mislead the banks into honoring the bad checks. *Id.* Given the design of the scheme, in which banks were the unambiguous targets, the Court did not question that the defendant acted with the intent to obtain the banks' money because his conduct was clearly directed at misleading the banks for that purpose. *Id.* at 300 (Marshall, J., dissenting) (describing majority decision).

The same analysis applies to other schemes that unambiguously target bank-owned property. For example, although loan fraud is often prosecuted under 18 U.S.C. § 1014, the government has secured loan-fraud convictions under clause (1). *See, e.g.*, *United States v. Rizk*, 660 F.3d 1125, 1127-28, 1135-36 (9th Cir. 2011) (defendant presented inflated appraisals to banks to obtain bank loans and was convicted under both § 1014 and § 1344(1)). Similarly, although bank embezzlement is covered by 18 U.S.C. § 656, it can also be prosecuted under clause (1). *See, e.g.*, *United States v. Severson*, 569 F.3d 683, 685-89 (7th Cir. 2009) (defendant conspired with bank president to take bank property and was charged under § 656 as well as § 1344(1) and § 1344(2)). In such cases, as with check

kiting, the intent to defraud a bank will be clear because a scheme to commit loan fraud or embezzlement is directed at a bank's own property. *See Agnew v. United States*, 165 U.S. 36, 50 (1897) (bank embezzlement created inference that defendant had the intent to defraud the bank).

In contrast, where a scheme targets bank-*held* property but does not reflect an intent to obtain bank-*owned* property, clause (2) provides an avenue of prosecution that dispenses with the need to prove such intent. For example, in *Maze*, the defendant targeted bank-held property by using his roommate's stolen credit card. 414 U.S. at 396-97. The scheme caused loss to a bank (as well as to the third-party merchants and the roommate) but contained "no indication" that the defendant's *objective* was to obtain bank-owned property. *Id.* at 402. In fact, the Court found the evidence to be to the contrary insofar as the defendant "probably would have preferred" that the merchants never mailed the invoices to the bank. *Id.* If the government proceeds under clause (2) in such a case, it does not have to prove the intent to defraud a bank. For this reason, schemes directed at bank-*held* property (like money in a bank customer's account) are often charged, and successfully proved, under that clause. *See, e.g.*, *Loughrin*, 134 S. Ct. at 2389 n.3 (noting that jury rejected defendant's argument that once he obtained cash from Target, using altered checks, he was "indifferent" to whether bank paid it and thus did not act with requisite intent to obtain bank-held money); *United States v. McNeil*, 320 F.3d 1034, 1037-40 (9th

Cir. 2003) (defendant's conduct "well within" scope of clause (2) where he misrepresented himself to bank in order to obtain third-party's tax refund).

That was not the approach taken here, however. Shaw misrepresented himself to the bank in order to take bank customer Stanley Hsu's money from his account. *See supra* Statement of the Case. As in *Maze*, there was "no indication" that Shaw intended to obtain bank-owned property (nor, by contrast to *Maze*, did he actually do so). *See Maze*, 414 U.S. at 402. When a defendant targets the money in a bank customer's account, that is, by default, a scheme to obtain property under the "custody or control" of the bank within the meaning of clause (2). *Loughrin*, 134 S. Ct. at 2392 (describing a scheme to obtain "the money in the victim's checking account" as a scheme to obtain property "under the custody or control of" the bank). It is not a scheme to target property "owned by" the bank, absent contrary evidence of intent. Indeed, schemes, like Shaw's, that aim to obtain bank-held property by means of a false representation to the bank are the paradigmatic clause (2) case. *Id.* at 2393 (clause (2)'s "by means of" language is satisfied "most clearly" when defendant makes misrepresentation to bank itself). Had the government prosecuted this case under clause (2) – the appropriate course where evidence of intent to defraud a bank is ambiguous, remote, or absent – it would have avoided clause (1)'s intent-to-defraud-a-bank element

altogether.[18] So charged, the government's task would have been straightforward.[19]

Given the comprehensive sweep of the statute's two clauses, any true bank-fraud scheme will be covered by § 1344. Where the alleged conduct is covered by both clauses, the government may proceed under

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[18] It also would have avoided this element by proceeding under the wire-fraud statute, which captures schemes to defraud *anyone*. 18 U.S.C. § 1343. Indeed, the mail- and wire-fraud statutes include provisions establishing heightened penalties for frauds that "affect[] a financial institution," such that the penalties match those in § 1344. *See* 18 U.S.C. §§ 1341, 1343. These provisions reflect Congress's understanding that the government would continue to use the mail- and wire-fraud statutes to prosecute frauds against banks, in appropriate cases, despite § 1344.

[19] That Shaw has not contested that he could be charged under clause (2) does not render the proper interpretation of clause (1) insignificant to defendants in general or to him in particular. The Court has held that the two clauses define separate crimes with different elements. *Loughrin*, 134 S. Ct. at 2388-92. And due process requires the government to prove beyond a reasonable doubt every element of a charged crime. *In re Winship*, 397 U.S. 358, 364 (1970). This constitutional burden of proof "plays a vital role in the American scheme of criminal procedure" because it is "a prime instrument for reducing the risk of convictions resting on factual error" and it "provides concrete substance for the presumption of innocence[.]" *Id.* at 363; *see also Clark v. Arizona*, 548 U.S. 735, 766 (2006) (applying presumption of innocence and burden of proof beyond a reasonable doubt to mens rea). It follows that any alleged bank fraud must be charged under the appropriate clause(s) of § 1344 to ensure that a jury is presented with the proper elements by which to judge the defendant's conduct. Shaw may have acted improperly, "[b]ut bad men, like good men, are entitled to be tried and sentenced in accordance with law." *Sorich v. United States*, 555 U.S. 1204, 1311 (2009) (Scalia, J., dissenting from denial of certiorari) (internal quotation marks omitted).

either or both (in separate counts). But where the conduct only supports a bank-fraud conviction under *one* of the clauses, the government must proceed under the applicable provision. If the government makes proper charging decisions – invoking the appropriate clause(s) given the conduct at issue – it should have no problem proving the requisite intent where it exists. But where, as here, the government tries to force a square peg into a round hole by charging what is a clause (2) scheme under clause (1), it *invites* a higher evidentiary burden and any consequent difficulty in meeting the requisite standard. Given the availability of clause (2), there is no need to stretch clause (1) beyond its plain meaning – even if the Court were permitted do that.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and remand the case for proceedings consistent with its opinion.

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LAWRENCE EUGENE SHAW, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a bank-fraud offense under 18 U.S.C. 1344(1) requires proof that the defendant intended to deceive and cheat the defrauded bank and expose the bank to a financial loss or a risk of loss.

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In the Supreme Court of the United States

No. 15-5991

LAWRENCE EUGENE SHAW, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 40-55) is reported at 781 F.3d 1130.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2015. A petition for rehearing was denied on June 8, 2015 (J.A. 56). The petition for a writ of certiorari was filed on September 4, 2015, and was granted on April 25, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on 14 counts of bank fraud, in violation

of 18 U.S.C. 1344(1). J.A. 27. The district court sentenced petitioner to 57 months of imprisonment, to be followed by five years of supervised release. J.A. 27-28. The court of appeals affirmed. J.A. 40-55.

1. Petitioner's counts of conviction stem from a series of actions that petitioner took in 2007 to execute a fraudulent scheme to obtain money from Bank of America (BoA) by executing bank transfers from a BoA checking account held by Stanley Hsu. J.A. 44-46; see Gov't Ex. 1. Hsu is a Taiwanese-born businessman who obtained United States citizenship after moving to the United States in 1982. C.A. E.R. 322-323. Sometime around 1996, Hsu opened his BoA account while living in California. *Id.* at 323. Soon thereafter, Hsu moved back to Taiwan and arranged to have his BoA statements mailed to his eldest son in California. *Id.* at 324. When that son later moved to Taiwan, however, Hsu arranged, on the suggestion of a work colleague, to have his BoA statements mailed to the colleague's daughter (Beatrice Fu), who lived in California, and who was supposed to forward Hsu's mail to him in Taiwan. *Id.* at 325-326, 343-344, 580-581, 584.

Petitioner—who was Fu's live-in boyfriend at the time—worked from their home and collected the mail as it arrived. C.A. E.R. 581-582, 584-585. Petitioner intercepted Hsu's BoA statements from the mail, and he used Hsu's personal information from them to gain access to Hsu's BoA account. J.A. 44. Petitioner then executed a scheme to obtain money through a series of fraudulent banking transactions: Petitioner used Hsu's personal information to transfer funds from a BoA account held by Hsu to a PayPal account that petitioner opened in Hsu's name; transferred funds from

that PayPal account to two bank accounts at Washington Mutual Bank (WaMu) that petitioner opened in his father's name; transferred funds from those WaMu accounts to a third WaMu account that petitioner opened in his father's name; and used the third WaMu account to write checks to himself and pay for his expenses. J.A. 44-46.

From June 4 to October 15, 2007, petitioner successfully executed 39 separate online electronic fund transactions that collectively transferred $307,047 from Hsu's BoA interest-bearing checking account to PayPal. Gov't Ex. 1, at 4-5, 8, 11, 13-14, 17 (BoA "Interest Checking Account" statements); Gov't Ex. 8 (PayPal transaction log); see J.A. 46. During that same period, petitioner executed numerous other banking transactions that moved the funds from PayPal through the WaMu accounts in his father's name. Gov't Ex. 8; Gov't Ex. 20, at 1-8, 13 (WaMu online interest-bearing savings account statements showing deposits from PayPal and transfers to WaMu account ending 8858); Gov't Ex. 21, at 1-4 (WaMu checking account statement showing same types of deposits and transfers); Gov't Ex. 22, at 2-12 (statement for WaMu account ending 8858 showing deposits and payments on 40 checks from the account). By October 17, 2007, the PayPal account held only $24,667 of the $307,047 that had been transferred from BoA. Gov't Ex. 8, at 1.

In October 2007, Hsu and his son discovered the fraudulent electronic fund transfers from Hsu's BoA checking account, reported the fraud to BoA, closed the compromised account, and opened a new BoA checking account with a new account number. J.A. 46; Gov't Ex. 1, at 16-17; Gov't. Ex. 98 (new account statement); see C.A. E.R. 326-327, 341. BoA then re-

versed 16 of the unauthorized electronic fund transfers that collectively withdrew $132,503 from Hsu's checking account between August 27, 2007, and Hsu's October 2007 report of the fraud, pursuant to a standard banking practice that gave BoA a 60-day window within which to reverse such unauthorized transfers processed through the industry's Automated Clearing House (ACH) network. C.A. E.R. 387-389, 393, 432, 451-452; Gov't Ex. 98, at 2; see Gov't Ex. 8, at 1; J.A. 46; see also pp. 27-28 & n.5, *infra* (discussing this practice). PayPal was thus required to reimburse BoA for the reversed transfers that BoA credited back to Hsu's account. J.A. 46; see C.A. E.R. 388-389.

As a result, BoA ultimately suffered no monetary loss from petitioner's scheme. C.A. E.R. 615. PayPal suffered a net $107,836 loss, reflecting its $132,503 reimbursement to BoA for transfers executed on or after August 27, 2007, less the $24,667 remaining in the scheme's PayPal account. See J.A. 31; cf. Gov't Ex. 8, at 1; Gov't Ex. 98, at 2. Hsu, in turn, suffered a net $174,544 reduction in his BoA account balance, which reflects the remaining unauthorized transfers that BoA did not reverse or otherwise credit back to his account. See J.A. 31.

2. A federal grand jury indicted petitioner on 17 counts of bank fraud, in violation of 18 U.S.C. 1344(1). J.A. 12-16. Section 1344 defines bank fraud as "knowingly execut[ing], or attempt[ing] to execute, a scheme or artifice—

> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution,

> by means of false or fraudulent pretenses, representations, or promises.

18 U.S.C. 1344. Because the indictment charged petitioner with violating Section 1344(1), J.A. 12, this case concerns whether petitioner knowingly executed, or attempted to execute, a scheme or artifice "to defraud a financial institution." 18 U.S.C. 1344(1).

At trial, petitioner admitted through counsel in opening and closing arguments that he was "involved in th[e] scheme" and had engaged in a "remarkable course of deception." C.A. E.R. 315, 706; see *id.* at 709. Petitioner, however, argued that the "scheme was not about the banks" and his execution of the scheme was "not bank fraud" because Hsu, not a bank, was the scheme's "intended victim" and the scheme's "one goal, and only one goal, * * * was to get Stanley Hsu's money." *Id.* at 315.

Petitioner requested that the district court instruct the jury that a "scheme to defraud" a financial institution under Section 1344(1) means "a scheme designed to victimize [a bank] by causing [the bank], not only Stanley Hsu, monetary loss." J.A. 25; see J.A. 22, 23. Petitioner similarly requested an instruction that Section 1344(1) requires the specific "intent to defraud" a bank, which, he argued, means "intent to deceive and cheat [the bank] in order to expose [the bank], not only Stanley Hsu, to monetary loss." J.A. 24; see J.A. 22, 23.

Petitioner conceded that circumstantial evidence in the case was sufficient to allow the jury to infer that petitioner "intended to cause the bank harm" and that the government could "argue * * * from the evidence" that petitioner intended "to victimize the institution" because petitioner would have had some "idea

that Mr. Hsu would not be left * * * shouldering the entirety of the loss." C.A. E.R. 647. Petitioner thus argued that his "problem [was] with [a jury] instruction" that failed to require "pro[of] that the bank [wa]s * * * an intended victim of the fraud," because, without such an instruction, the jury could convict petitioner even if it concluded that "[petitioner] never thought that the bank would pay any money out to reimburse Mr. Hsu." *Id.* at 646-647.

The district court rejected petitioner's proposed instructions to require proof of petitioner's "intent to expose [a bank] to a loss or risk of loss." C.A. E.R. 639, 650. The court instead instructed the jury that, to establish bank fraud under Section 1344(1), the government must prove beyond a reasonable doubt that, as relevant here, petitioner "knowingly executed a scheme to defraud a financial institution as to a material matter" with "intent to defraud the financial institution." J.A. 17. A "scheme to defraud," the court explained, is a deliberate plan of action or course of conduct by which "someone intends to deceive, cheat, or deprive a financial institution of something of value." J.A. 18. A "material matter," in turn, is one that has a natural tendency to influence or is capable of influencing a bank to "part with money or property." *Ibid.* Finally, an "intent to defraud," the court instructed, "is an intent to deceive or cheat." J.A. 19. The court added that Section 1344(1) does not require "pro[of] that any financial institution lost any money or property as a result of the scheme to defraud." J.A. 18.

The jury found petitioner guilty on 14 bank-fraud counts. J.A. 27.

3. The court of appeals affirmed. J.A. 40-55. The court held that "[t]he district court correctly refused [petitioner's proposed jury] instructions," J.A. 55, which would have required a jury finding that petitioner "intended the bank * * * to suffer an actual loss or risk of loss as the financial victim of the fraud," J.A. 47. The court of appeals agreed that "an instruction" requiring the jury to find that petitioner "intended the bank to bear the loss" of his scheme, J.A. 43, is inconsistent with the requirements for criminal liability under Section 1344(1). J.A. 51-55.

The court of appeals reasoned that Section 1344's text provides no support for petitioner's argument that Section 1344(1) differs from Section 1344(2) with respect to "the intended financial victim of the fraud, i.e., the intended bearer of the loss." J.A. 51. Neither provision, the court explained, "refers to monetary loss or to the risk of such loss." *Ibid.* Instead, Section 1344(1)'s text "focuses on the intended victim of the deception" (a bank) and, for that reason, it applies to schemes "to deceive the bank" and "covers schemes to deceive the bank directly." *Ibid.* The court accordingly held that Section 1344(1) does not "require[] the government to establish the defendant intended the bank to suffer a financial loss." *Ibid.*

The court of appeals explained that *Loughrin* v. *United States*, 134 S. Ct. 2384 (2014), which held that Section 1344(2) does not require proof that the defendant's fraudulent scheme "created a risk of financial loss to the bank," *id.* at 2395 n.9, reinforced the conclusion that neither Section 1344(1) nor Section 1344(2) turns on "which entity the defendant intended to bear the financial loss" of his scheme. J.A. 53-54. *Loughrin*, the court explained, determined that Sec-

tion 1344(2) was designed to avoid "entangling courts in technical issues of banking law about whether the [bank], or, alternatively, a depositor would suffer the loss from a successful fraud." J.A. 54 (quoting *Loughrin*, 134 S. Ct. at 2395 n.9). "There is no reason to believe Congress wanted courts to become more entangled in such technical issues under [Section 1344(1)] than under [Section 1344(2)]." *Ibid.*

The court of appeals noted that some courts of appeals had previously held that Section 1344(1) requires proof of a "risk of financial loss to the bank," and that those courts had based their holdings on a passage in Section 1344's legislative history reflecting Congress's strong interest in "'protecting the financial integrity'" of banks. J.A. 54 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 377 (1983)). But the court concluded that requiring proof of intent to expose a bank to loss "does not serve" to protect banks' financial integrity: "Few criminals have any knowledge of the rules of law that govern which entity bears the risk of loss," and the identity of the person ultimately bearing that risk depends upon "the operation of banking laws," not the identity of the person "that the defendant intends to harm." J.A. 55. The court accordingly refused to "read an additional element into [Section] 1344(1) that Congress did not include; that does not serve the Congressional purpose; and that could needlessly entangle judges and juries in the intricacies of banking law." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly rejected petitioner's challenge to his bank-fraud conviction under Section 1344(1). Petitioner argues (Br. 9, 11, 15-33) in his merits brief that Section 1344(1) applies only if the

defendant specifically intended to obtain property *owned* by a bank. That argument is different than the argument that petitioner advanced in his proposed jury instructions and in his certiorari petition, namely, that the defendant must "intend[] to expose the bank to actual or potential loss," Pet. 23 (emphasis omitted); see J.A. 22-25. Both of petitioner's contentions are incorrect. Section 1344(1) prohibits the knowing execution of a scheme to defraud a bank of a property interest by deceiving the bank, but it is not limited only to those defendants who intend to deprive the bank of an ownership interest in property or to expose the bank to a monetary loss or risk of loss.

1. Like the mail- and wire-fraud provisions on which it was modeled, Section 1344(1) addresses schemes that would deprive victims of "property" rights. Although petitioner assumes that such "property" interests narrowly include only ownership interests, the concept of "property" in this context had long been "interpreted broadly." *McNally* v. *United States*, 483 U.S. 350, 356 (1987). The term "property" is commonly understood to include "anything of material value *owned or possessed*." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 338 (1979) (emphasis added). A fraudulent deprivation of property rights in this context thus "signif[ies] the deprivation of something of value." *McNally*, 483 U.S. at 358 (citation omitted). Indeed, this Court's decisions apply the mail- and wire-fraud prohibitions well beyond the protection of only ownership interests in property.

Section 1344(1)'s protection of non-ownership possessory interests reflects the normally broad understanding of "property." A lessee's possessory interest in land and a bailee's possessory interest in an item

that it holds for a bailor both reflect types of "property" interests recognized in the law. This Court has similarly deemed non-ownership possessory interests to be "property" under the Due Process Clause, "property" protected against unreasonable seizure, and "property" protected under the Just Compensation Clause. No sound reason exists for a different result here.

Petitioner argues (Br. 30-33) that Section 1344(2)'s focus on property "owned by, or under the custody or control of, a financial institution" indicates that Congress took a more limited approach to Section 1344(1). But nothing in Section 1344(2) suggests that Congress intended Section 1344(1) to apply only to property owned by a bank. Indeed, Congress's decision to model Section 1344(1) on the mail- and wire-fraud statutes evinces an intention to give Section 1344(1) the same broad protection for property interests.

Petitioner's reliance (Br. 34-40) on legislative history is equally misplaced. Although Congress enacted Section 1344(1) in part to protect the financial integrity of banks, petitioner's bank-owned property limitation would not sensibly advance that interest. The financial impact of a fraudulent scheme on a bank normally turns on the operation of banking laws and practices governing who will bear the loss, not on whether a defendant targeted property owned by the bank. And to the extent that petitioner argues that Congress intended only to prohibit schemes in which the defendant *believes* (rightly or wrongly) that a bank holds an ownership interest in the money he targets, petitioner's position does not rationally advance an interest in protecting the financial integrity

of banks or distinguish between criminal and non-criminal intent.

Petitioner's bank-owned property theory is particular anomalous in this context. A bank customer's deposit of funds gives ownership of those funds to the bank, which then owes a debt to the customer. The bank may then lend the funds deposited, and it repays its debt to the customer on the customer's demand, often paying interest on deposited funds. Petitioner's recognition (Br. 13, 42-43) that loan-fraud and check-kiting schemes are covered by Section 1344(1) illustrates that his position rests on a fundamental misunderstanding of the banking system. Such schemes, like schemes targeting customer deposits, target the same source of bank-owned money.

2. To the extent petitioner continues to argue that Section 1344(1) requires proof of "inten[t] to expose the bank to actual or potential loss," Pet. 23 (emphasis omitted), that contention lacks merit.

A scheme to "defraud" under Section 1344(1), like its mail- and wire-fraud counterparts, draws meaning from the common law. The requisite culpable intent at common law, however, was merely an intent to deceive, not to harm. And Congress specifically considered and rejected statutory text that would have required an intent to cause a bank economic loss. Congress ultimately adopted text for Section 1344(1) modeled on the mail- and wire-fraud statutes, which Congress understood to include no such requirement.

Finally, an intent-to-harm-the-bank requirement is unsound and serves no evident legislative goal. That requirement suffers from the same basic defects as petitioner's intent-to-target-bank-owned-property requirement. The rules governing allocation of loss

from a banking transaction are complex and vary depending on the type of transaction at issue. A layperson's (likely non-existent) beliefs about how such rules will apply not only will normally have little or no connection to a bank's actual risk of loss, they also fail to distinguish between culpable and non-culpable intent. In short, no sound reason exists for Congress to have wanted bank-fraud liability to turn on a schemer's subjective beliefs on such issues.

ARGUMENT

SECTION 1344(1) IS NOT LIMITED TO SCHEMES TARGETING PROPERTY OWNED BY THE BANK AND DOES NOT REQUIRE INTENT TO CAUSE THE BANK HARM

Petitioner argues (Br. 9-13, 15-33) that Section 1344(1) is limited to bank-fraud schemes in which "the defendant's objective" is "to obtain a bank's *own* property by deceiving that bank." Br. 9. In petitioner's view, Section 1344(1) thus applies only to schemes intended to obtain "bank-*owned* property" but does not apply if the scheme seeks to "obtain non-bank property in the custody and control of the bank, such as bank-customer money." Br. 9, 11-12. That argument shifts petitioner's position from the jury instructions he requested, J.A. 22-25, and from the claim he advanced in seeking certiorari, namely, that Section 1344(1) requires proof that "the defendant *intended* to expose the bank to *actual or potential loss*." Pet. 23 (second emphasis added); see Pet. 13, 20; Pet. Reply Br. 1, 3, 5 (discussing circuit split on whether Section 1344(1) requires "proof of intent to harm a bank"); see also J.A. 50-51. Neither position is correct: Section 1344(1) covers fraudulent schemes designed to obtain money or other property in a bank's custody or control, even if that property is not owned by the bank

and even if the schemer does not intend to "expose" the bank to "monetary loss," J.A. 22-25.

A. The Bank-Fraud Statute Comprehensively Protects Banks From Deceptive Schemes To Obtain Money Or Property Owned By Banks Or Held By Banks On Behalf Of Their Customers

1. Section 1344 makes it a criminal offense "knowingly [to] execute[], or [to] attempt[] to execute, a scheme or artifice" that satisfies either of two descriptions. 18 U.S.C. 1344. In separate clauses, Section 1344 prohibits a scheme or artifice: (1) "to defraud a financial institution," or (2) to obtain money or other "property owned by, or under the custody or control of, a financial institution" by means of "false or fraudulent pretenses, representations, or promises." *Ibid.* Those two clauses set forth complementary prohibitions that Congress designed to "reach a wide range of fraudulent activity." S. Rep. No. 225, 98th Cong., 1st Sess. 378 (1983) (*Senate Report*). The section was intended to remedy gaps in prior law in order to serve the "strong Federal interest in protecting the financial integrity of" banks against "those who [would] victimize these banks through fraudulent schemes." *Id.* at 377.

Section 1344's text reflects the broad scope of its coverage. The statute's focus on a "scheme or artifice" reflects that the "gravamen of the offense is the scheme," *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647 (2008), "rather than [a] completed fraud," *Neder* v. *United States*, 527 U.S. 1, 25 (1999) (construing Section 1344). Concepts such as "reliance and damage" that are integral to a common-law action for fraud therefore "have no place" in a Section 1344 prosecution. *Id.* at 24-25. Instead, the prohibition

falls on anyone who "knowingly executes, or attempts to execute," the prohibited schemes. 18 U.S.C. 1344.

The two clauses of Section 1344 have distinct but overlapping functions. Section 1344(1) covers any "scheme * * * to defraud a financial institution," which reaches a deceptive scheme designed to deprive the bank of property, even if it does "not involve * * * false representations." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 n.4 (2014) (identifying check kiting as a deceptive scheme prohibited by Section 1344(1) that makes no false representations); cf. *Williams* v. *United States*, 458 U.S. 279, 284-285 (1982) (holding that "a check is not a factual assertion" and that checks used in a check-kiting scheme therefore do not make "false statement[s]" about the drawer's account balance). Section 1344(2), in contrast, applies only when the scheme uses a "false statement [a]s the mechanism naturally inducing the bank (or custodian of bank property) to part with money in its control." *Loughrin*, 134 S. Ct. at 2393. Section 1344(2) therefore does not extend to all schemes prohibited by Section 1344(1). See *id.* at 2390 n.4. But Section 1344(2) serves the distinct function of covering schemes designed to cause "a non-bank custodian [to] giv[e] up bank[-owned] property that it holds." *Id.* at 2389.

2. In *Loughrin*, this Court resolved two questions about the scope of Section 1344(2). Loughrin contended that Section 1344(2) required the government to prove that "the defendant intended to defraud a bank" and that the "scheme created a risk of financial loss to the bank." 134 S. Ct. at 2389, 2395 n.9. The Court rejected both contentions. First, the Court held that no intent-to-defraud element appeared in the text

of Section 1344(2) and that, given that "all agree" that the text of Section 1344(1) "includes the requirement that a defendant intend to 'defraud a financial institution,'" no parallel requirement should be read into Section 1344(2). *Id.* at 2389-2390. The Court explained that Section 1344(2) applies to schemes designed to obtain all forms of bank property by means of false statements "naturally inducing a bank (or custodian of bank property) to part with money in its control," *id.* at 2393, and reasoned that none of Loughrin's contentions "avoid[ed] the import of the statute's plain text," *id.* at 2390. Second, the Court rejected what it characterized as Loughrin's "last-gasp argument," namely, the argument that Section 1344(2) requires proof that that defendant's scheme "created a risk of financial loss to the bank." *Id.* at 2395 n.9. The Court again noted the absence of any such textual requirement and added that Section 1344(2)'s broad text "appears calculated to avoid entangling courts in technical issues of banking law about whether the financial institution or, alternatively, a depositor would suffer the loss from a successful fraud." *Ibid.*

Loughrin articulated three interpretative principles that are relevant to the construction of Section 1344(1), the provision at issue here. First, while normal interpretive principles apply to the bank-fraud statute's language, "unstated element[s]" should not be read into its provisions. 134 S. Ct. at 2389-2390, 2394. Rather, the "plain text" controls. *Id.* at 2390. Second, given the related prohibitions Congress provided in the two clauses of Section 1344, "the overlap between [Section 1344(1) and Section 1344(2)] is substantial." *Id.* at 2390 n.4. The two clauses form a

Venn diagram, with each clause prohibiting conduct that the other does not, with a significant zone of common coverage. See *id.* at 2389, 2390 n.4. Third, complex rules that turn on "technical issues of banking law" have no place in defining the scope of Section 1344's protection against deceptive schemes. *Id.* at 2395 n.9. Applying those principles here, petitioner's non-textual limitations on the scope of Section 1344(1) meet the same fate as Loughrin's.

B. Bank Deposits Are A "Property" Interest That Section 1344(1) Protects From Fraudulent Schemes

Petitioner primarily argues (Br. i, 9, 12-13, 15-17, 31-34, 41, 44-45) that Section 1344(1)'s prohibition against the knowing execution of a "scheme to defraud" a bank prohibits "only" the execution of "schemes to obtain bank-owned property," not schemes to obtain "bank-held property" like "bank-customer money" within "the custody and control of the bank." Br. 9, 12-13. That argument misapprehends the breath of the term "scheme to defraud." That phrase, as used in the bank-fraud, mail-fraud, and wire-fraud statutes, protects all property interests against deceptive schemes—including possessory interests in property. Nothing in the concept of fraud embodied in those statutes limits its protection of property to ownership interests. As such, Section 1344(1) covers schemes to obtain bank deposits, whether or not the bank owns the deposits itself.

1. Section 1344(1)'s prohibition against a "scheme to defraud" a bank protects against deprivation of a broad spectrum of property interests, including both ownership and possessory interests

Congress "modeled [Section 1344] on the mail and wire fraud statutes" (18 U.S.C. 1341 and 1343) and copied the phrase "'scheme or artifice to defraud'" directly from those provisions. *Neder*, 527 U.S. at 20-21; see *Loughrin*, 134 S. Ct. at 2391. In doing so, Congress intended to build upon judicial decisions construing the "wire and mail fraud statutes * * * to reach a wide range of fraudulent activity." *Senate Report* 378. The phrase "scheme or artifice to defraud" in the bank fraud statute must therefore be read *in pari materia* with its counterparts in the mail- and wire-fraud statutes. See *Neder*, 527 U.S. at 20; see also *Pasquantino* v. *United States*, 544 U.S. 349, 355 n.2 (2005) (mail and wire fraud). This Court's decisions construing those provisions show that a "scheme to defraud" a bank under Section 1344(1) is a scheme designed to deprive a bank of a property interest by deceiving the bank.[1]

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[1] Section 1344(1) differs from the mail- and wire-fraud statutes in that it applies to a "scheme or artifice * * * to defraud *a financial institution*," 18 U.S.C. 1344(1) (emphasis added), and not more generally to "scheme[s] or artifice[s] to defraud," 18 U.S.C. 1341, 1343. The government thus agrees with petitioner that that textual difference means that Section 1344(1) extends only to schemes designed to deprive a bank of a property interest by deceiving the bank. Cf. Pet. Br. 23-28 (arguing for that result because Section 1344(1) uses "financial institution" as the direct object of "defraud"; citing decisions construing different government-specific statutes with parallel phrasing, including *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U.S. 662, 668 (2008) (false claim to government); *Tanner* v. *United States*, 483

a. Congress's use of the term "defraud" in the mail-fraud, wire-fraud, and bank-fraud contexts borrows meaning from the term's common-law usage. *Neder*, 527 U.S. at 22-23. "[T]he words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes.'" *McNally* v. *United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924)). *McNally* accordingly determined that Section 1341's prohibition against use of the mail in "schemes or artifices 'to defraud'" was "limited in scope to the protection of property rights." *Id.* at 358, 360.[2]

A "property right" in this context, however, includes many forms of cognizable property interests. For more than a century, the Court has held that the phrase "'scheme or artifice to defraud'" must be "interpreted broadly insofar as property rights are concerned." *McNally*, 483 U.S. at 356 (citing *Durland* v. *United States*, 161 U.S. 306 (1896)). The Court has thus recognized that "property" in the wire-fraud context includes "[v]aluable entitlements" because the

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U.S. 107, 128 (1987) (defrauding the United States); *United States* v. *Cohn*, 270 U.S. 339, 343 (1926) (same)). The decisions petitioner cites, however, do not address the scope of the property interests protected by the mail-, wire-, and bank-fraud statutes, or whether those interests are limited to ownership interests in property. Cf. *McNally* v. *United States*, 483 U.S. 350, 359 n.8 (1987) (concluding that scope of the mail-fraud statute should not follow the scope of "a statute aimed at protecting the Federal Government alone").

[2] Congress responded to *McNally* by amending the fraud statutes to provide that for purposes of the relevant chapter, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346; see *Skilling* v. *United States*, 561 U.S. 358, 402 (2010). That provision is not at issue here.

concept of "property" ordinarily "'extend[s] to every species of valuable right and interest.'" *Pasquantino*, 544 U.S. at 356 (quoting *Black's Law Dictionary* 1382 (4th ed. 1951)). The Court has similarly recognized that the normal understanding of "property" includes not only ownership interests but also possessory interests. "In its dictionary definitions and in common usage 'property' comprehends anything of material value *owned or possessed*." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 338 (1979) (emphasis added). That expansive understanding of "property" reflects *McNally*'s understanding that the term "defraud" "usually signif[ies] the deprivation of *something of value*"—*i.e.*, a property interest—"by trick, deceit, chicane or overreaching." 483 U.S. at 358 (emphasis added) (quoting *Hammerschmidt*, 265 U.S. at 188).

Consistent with that expansive understanding of property interests, the Court in *Carpenter* v. *United States*, 484 U.S. 19 (1987), held that a newspaper's intangible "right to exclusive *use* of the information" that it plans to publish is a property right protected under the fraud statutes, even though the schemers (who secretly used the information to make pre-publication stock trades) did "not interfere with the [newspaper's] use of the information," did "not publicize it" themselves, and did not cause the paper any "monetary loss." *Id.* at 26 (emphasis added). *Pasquantino* similarly concluded that where a liquor smuggling scheme deprived Canada of a right to uncollected excise taxes, that right was a "property" interest protected under the wire-fraud statute as "'something of value'" to Canada. 544 U.S. at 355-356 (quoting *McNally*, 483 U.S. at 358). Neither decision is consistent with petitioner's view that a "scheme to

defraud" a bank protects only the bank's ownership interest in property.

The Court has also recognized that interests in property that is not owned by an individual may fall with the broad scope of "property" protected in federal criminal law. For example, in *Cleveland* v. *United States*, 531 U.S. 12 (2000), the Court concluded that the "thing obtained [by a fraudulent scheme] must be property in the hands of the victim," *id.* at 15, and that an unissued video poker license in the hands of the State did not qualify, because the State's interest in the license was a "purely regulatory" one reflecting the exercise of its "sovereign [police] power to regulate," *id.* at 20-23 (citation omitted). But the Court did not question that an issued "video poker license[]" may constitute a "property interest[]" under the federal fraud statutes in the hands of the licensee. *Id.* at 25 & n.4.[3] More recently, when the Court confronted a similar issue concerning the scope of "property" protected under the Hobbs Act, 18 U.S.C. 1951, the Court declined to decide whether a "right to make a recommendation" qualifies as "property." *Sekhar* v. *United States*, 133 S. Ct. 2720, 2726 n.5 (2013) (citation and brackets omitted). The Court suggested that it may well qualify as property, explaining that, if "one defines property to include anything of value," "surely

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[3] The Court did not resolve that issue, but it analogized such issued licenses to other "state-issued licenses essential to pursuing an occupation or livelihood," such as a driver's license, in which the Court has held that "individuals have constitutionally protected property interests." *Cleveland*, 531 U.S. at 26 n.4 (citing *Bell* v. *Burson*, 402 U.S. 535, 539 (1971)). An individual's interest in such licenses would not typically be described as an "ownership" interest. See *Bell*, 402 U.S. at 539 (referring to an interest in "continued possession" of an issued driver's license).

some rights to make recommendations would qualify." *Ibid.*

b. Section 1344(1)'s protection of possessory interests as a form of "property" reflects the normal understanding of that term, which encompasses "anything of material value owned or *possessed*." *Reiter*, 442 U.S. at 338 (emphasis added). No one would doubt that a lessee, who holds a "possessory interest" in land, see *Alamo Land & Cattle Co.* v. *Arizona*, 424 U.S. 295, 303 (1976); *Black's Law Dictionary* 1027 (10th ed. 2014) (defining "leasehold" as "[a] tenant's possessory estate in land or premises), has a property interest. See, *e.g.*, *Lynch* v. *Alworth-Stephens Co.*, 267 U.S. 364, 368 (1925) (recognizing, for tax purposes, that an interest in mining leases constituted "property"). And that is so even though the lessee does not hold an ownership interest in the land itself. *Black's Law Dictionary* 1353 (10th ed. 2014) (defining "possessory interest" as "[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner").

Similarly, a bailee's possessory interest in an item that it holds for the bailor is properly characterized as a type of "property" interest in this context. *Black's Law Dictionary* 168 (10th ed. 2014) (defining "bailee" as "[s]omeone who receives personal property from another, and has possession of but not title to the property"). And to the extent that a bank holds a customer's deposit as a bailee, its possessory interest is something of value that qualifies as a property interest protected by the bank-fraud statute. Blackstone concluded long ago that when a bailee takes possession of goods from a bailor, the bailee acquires "a special qualified property" that permits him to

maintain an action to "vindicate, in [his] own right," his "possessory interest[] against any stranger" who may "injure or take away" the goods. 2 William Blackstone, *Commentaries on the Laws of England* 453-454 (1766) (Blackstone); see *id.* at 395-396. Justice Story similarly concluded that the bailee's "lawful right of custody or possession of [goods]" will "constitute[] a sufficient title to maintain" an action for damages "against a stranger[] for injury to," or conversion of, the goods. Joseph Story, *Commentaries on the Law of Bailments* §§ 93g, 94, at 98-99, 102 (8th ed. 1870) (suggesting that use of the term "special property" may not be apt in the context of a bailee who lacks an interest for which he could detain the thing against its owner).

And this Court in a variety of contexts has similarly deemed non-ownership possessory interests to be a type of "property" for constitutional purposes. Cf. *Cleveland*, 531 U.S. at 25 & n.4 (drawing analogy to constitutionally protected property interests in suggesting that issued video poker license may constitute "property" under federal fraud law). The Fifth and Fourteenth Amendments' protections against deprivations of property without due process of law, for instance, extend to the deprivation of a "right to continued possession" of goods. See *Fuentes* v. *Shevin*, 407 U.S. 67, 86-87 & n.16 (1972) (goods held by consumer under installment sale agreement before consumer obtained ownership); see also, *e.g.*, *Sanders* v. *City of San Diego*, 93 F.3d 1423, 1426-1427 (9th Cir. 1996) (pawnbroker's possession of goods owned by customer). A "'seizure' of property" regulated by the Fourth Amendment likewise occurs when there is "'some meaningful interference with an individual's possesso-

ry interests in that property.'" *Soldal* v. *Cook Cnty.*, 506 U.S. 56, 61 (1992) (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984)). And the Just Compensation Clause of the Fifth Amendment applies to takings of leaseholds. See *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 476 (1973).

No sound reason exists for a different result in the bank-fraud context. Nothing suggests that Congress wanted to distinguish deposits owned by a bank and deposits in which the bank holds possession. To the contrary, Congress enacted the bank-fraud statute as a broad prohibition to "reach a wide range of fraudulent activity." *Senate Report* 378. The statute thus covers all such schemes to defraud a bank that target any funds held by the bank, whether the bank owns those funds or holds them as a bailee for its customer. That result makes good sense. Even when the bank merely holds funds for its customer, as Blackstone observed, "such [a] bailee is responsible to the [customer who owns the funds]," 2 Blackstone 454.

2. Section 1344's structure does not limit Section 1344(1)'s protections only to bank ownership interests in property

Petitioner nevertheless contends (Br. 30-33) that textual differences between Section 1344(1) and Section 1344(2) support his position. He argues (Br. 32) that Section 1344(2), which prohibits certain schemes to obtain "property owned by, or under the custody or control of, a [bank]," 18 U.S.C. 1344(2), shows that Congress "recognized the distinction between"—and "knew how to draft a statute" that would reach—both "schemes that target bank-owned property and those that target bank-held property." Petitioner concludes

(Br. 32) that Congress's choice of different language in Section 1344(1) reflects a choice to limit Section 1344(1) to just bank-owned property. The inferences that petitioner draws from his comparison of the two clauses are illogical and at odds with Section 1344's origins.

First, as a matter of logic, petitioner incorrectly asserts (Br. 31) that Section 1344(2) addresses only two categories of property: "bank-owned property" and "bank-held property." Petitioner views (*ibid.*) that dichotomy as illustrating that a "scheme to obtain property 'owned by' a bank is not a scheme to obtain property 'in the custody or control of' a bank," and that only the former is covered by Section 1344(1). In fact, Section 1344(2) covers three related categories: (1) property owned by the bank *and* in its custody or control; (2) property not owned by the bank but in its custody or control; and (3) "property 'owned by' the bank but in someone else's custody and control," *Loughrin*, 134 S. Ct. at 2389. See 18 U.S.C. 1344(2). Nothing in Clause (2)'s coverage of all three categories implies that Clause (1) covers only one category. As explained, while each clause covers ground that the other does not, the overlap remains "substantial." *Loughrin*, 134 S. Ct. at 2390 n.4. And petitioner provides no particularized reason to believe that Congress intended Clause (1) to protect against schemes to defraud the bank of property it owned, but not of property that it possessed.

Second, petitioner's approach overlooks the relationship between Section 1344 and its mail- and wire-fraud predecessors. When Congress enacted Section 1344 in 1984, it intentionally "modeled" the statutory text on the "wire and mail fraud statutes" in order to

build upon the judicial decisions that had construed those statutes "to reach a wide range of fraudulent activity." *Senate Report* 378. Congress accordingly copied the phrase "scheme or artifice to defraud" directly from the mail- and wire-fraud statutes and inserted it into Section 1344(1). See *Neder*, 527 U.S. at 20-21. It follows that Congress would have expected Section 1344(1), like its predecessors, to be "interpreted *broadly* insofar as property rights are concerned"—a position that was established in the Court's 1896 decision in *Durland*. *McNally*, 483 U.S. at 356 (emphasis added). Petitioner's restrictive understanding of the "property" interests protected by Section 1344 disregards Congress's intent to borrow preexisting text to ensure the broad application of Section 1344(1).

3. Section 1344's legislative history does not support petitioner's bank-owned property theory

Petitioner's uncontroversial discussion (Br. 34-40) of Section 1344's legislative history does not assist him.[4] Nothing in that history reflects any congressional desire to impose petitioner's bank-owned-property limitation upon Section 1344(1).

a. Congress enacted Section 1344 in the wake of three decisions by this Court addressing bank-fraud prosecutions. *Senate Report* 377-378 & n.3. Those decisions showed that the government's prior "approach of prosecuting bank fraud under statutes not specifically designed" for that purpose had become

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[4] Much of petitioner's recitation tracks the history described in the government's brief in *Loughrin*. Compare Br. 16 n.7, 34-40, with U.S. Br. at 2-3, 27-29, 35-36 & n.7, *Loughrin*, *supra* (No. 13-316).

"problematic" after the decisions identified significant "gaps in [those] existing statutes." *Id.* at 377-378 (discussing *United States* v. *Maze*, 414 U.S. 395 (1974) (mail fraud, 18 U.S.C. 1341); *Williams*, *supra* (bank false statement, 18 U.S.C. 1014); and *Bell* v. *United States*, 462 U.S. 356 (1983) (bank theft, 18 U.S.C. 2113(b)).

Maze, for instance, involved a defendant who forged the cardholder's signature on a stolen bank-issued credit card to make purchases at various merchants. 414 U.S. at 396-397. The Court concluded that the merchants, the bank that issued the card, and the card owner were "all * * * victims of [the fraudulent] scheme," regardless "which of [the] victims ultimately bore the loss," but it concluded that the *mailing element* of the mail-fraud statute was not satisfied by post-purchase mailings directed toward "adjusting accounts between * * * th[ose] victims." *Id.* at 402. *Williams* and *Bell* similarly highlighted the limitations of the false-statement and bank-theft provisions that the government had used after *Maze* to prosecute a (more limited) number of bank-fraud offenses. See *Senate Report* 378 & n.3.

Section 1344's legislative history, however, does not discuss whether any particular type of bank-fraud scheme would be prosecutable under only Section 1344(1), Section 1344(2), or both, much less indicate an intent that Section 1344(1) be limited to schemes that target bank-owned property. To the contrary, *Maze* cuts against petitioner's position. Because Congress reacted to *Maze* by enacting Section 1344, which Congress intended to "reach a wide range of fraudulent activity," *Senate Report* 378, Congress would have logically intended to protect banks victimized by fraud

regardless whether such banks would "ultimately b[ear] the loss" of such fraud, *Maze*, 414 U.S. at 402. Even when a fraud scheme targets non-bank-owned property that a bank keeps in its custody for a customer, the need to allocate any resulting loss and the uncertainty about which party would bear it has the potential to impose financial costs upon the bank.

b. Petitioner's reliance (Br. 39) on the Senate Committee's desire to "protect[] the financial integrity of [financial] institutions," *Senate Report* 377, does not assist him. Petitioner provides no sensible basis for believing that Congress wished to further that interest by limiting Section 1344(1) to schemes whose "*object*" is to "target property 'owned by' the bank" and to require "evidence of intent" on this point. Br. 17 n.8, 45.

Regardless whether the property that a scheme targets is owned by the bank itself or is just in the bank's custody or control, the financial impact of such a scheme, as the court of appeals recognized, will normally turn on "the operation of banking laws" and practices governing who bears the loss. J.A. 46, 55. This case illustrates the point. Once petitioner's fraud was discovered, BoA was able under the governing National Automated Clearing House Association (NACHA) Operating Rules for the ACH transfers in question to reverse the unauthorized transfers from Hsu's account that occurred within (approximately) the last 60 days, thus shifting the loss for those transfers to PayPal.[5] Liability for the earlier withdrawals

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[5] The banking practice discussed at trial (see p. 4, *supra*), reflects a practice embodied in NACHA Operating Rules, the relevant portions of which have not materially changed since 2007.

that fell outside that window, in turn, should have been governed by the Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, and its implementing regulation, known as Regulation E, 12 C.F.R. Pt. 1005 (formerly 12 C.F.R. Pt. 205 (2007)). Those provisions provide limitations on a banking consumer's liability and therefore in some circumstances result in the bank's bearing the loss or sharing it with its customer. See 15 U.S.C. 1693g(a); 12 C.F.R. 1005.6(b)(3).[6] The

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If a banking consumer provides an appropriate written statement that an ACH withdrawal from his account was unauthorized, the NACHA Operating Rules generally allow a bank in BoA's position (a Receiving Depository Financial Institution (RDFI)) to return the original ACH withdrawal request to the bank that originated the request (an Originating Depository Financial Institution (ODFI)) on behalf of an entity like PayPal if the RDFI recredits the consumer's account and submits the return entry so that it can be made available to the ODFI "no later than the opening of business on the Banking Day following the sixtieth calendar date following the Settlement Date of the original [withdrawal request]". NACHA Operating R. § 3.13.1(b) (2016); see *id.* §§ 8.37(b), 8.41, 8.66, 8.83, 8.101 (definitions); see also *id.* § 8.7.1 (2007). Compare NACHA Operating R. App. Pt. 4.2 (2016) (table listing "R10" return code as "Customer Advises Unauthorized"), with C.A. E.R. 388 (BoA submitted "R-10" code "indicating [each of 16 ACH transfers] was unauthorized"). Because the ODFI "must accept" such a timely and properly submitted return entry, NACHA Operating R. § 2.12.1 (2016); see *id.* § 6.1.6 (2007), the unauthorized transfer is then, in effect, reversed. Cf. C.A. E.R. 387-388, 432 (BoA initiated "auto-reversals" of the 16 "ACH" transfers); Gov't Ex. 98, at 2 (showing credits to Hsu's new account for the 16 reversed "ACH" transactions that originally posted from August 27 and October 15, 2007).

[6] A consumer can be liable up to $500 for a series of unauthorized electronic fund transfers that involve the use of an "accepted access device." 12 C.F.R. 1005.6(a), (b)(1), and (2); see 12 C.F.R. 1005.2(a)(2). Regardless whether such a device is used, a consum-

key point, however, is that petitioner's bank-owned-property theory could limit the reach of Section 1344(1) even though the complex regulatory regime governing such frauds may end up placing the loss squarely on the shoulders of the bank.[7] Nothing suggests that Congress wanted frauds that could weaken a bank's financial integrity to be off limits to prosecution in these circumstances.

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er can be additionally liable for the full amount of unauthorized transfers that occur after he fails to "report [to his bank] an unauthorized electronic fund transfer [from his account] that appears on a periodic statement within 60 days of the financial institution's transmittal of the statement." 12 C.F.R. 1005.6(b)(3); see 15 U.S.C. 1693g(a); 12 C.F.R. 1005.2(m). A consumer therefore has no additional liability for either (a) unauthorized transfers that occur before the bank sends him the statement showing the first unauthorized transfer or (b) unauthorized transfers occurring within 60 days after the statement's transmittal. 12 C.F.R. 1005.6(b)(3). The consumer's liability instead extends (unless limited further by state law or contract) to all "subsequent [unauthorized] transfers" that occur after the lapse of the 60-day period and "before [he gives] notice to the institution" if the institution "establishes [that the transfers] would not have occurred" if it had been notified within the 60-day period. *Ibid.*; see 15 U.S.C. 1693g(a) and (d); 12 C.F.R. 1005.6(b)(6); see also 12 C.F.R. Pt. 1005, Supp. I, at 226 (official interpretation).

[7] Whether a bank suffers a financial loss can also depend on whether banking personnel are fully aware of such rules or whether the bank decides to compensate its customer beyond its legal obligation to do so. Cf. *United States* v. *Stavroulakis*, 952 F.2d 686, 695 (2d Cir.) (noting that banks "will often swallow the loss for the customer" for a forged check, even if "the bank is not legally liable"), cert. denied, 504 U.S. 926 (1992).

4. No sound reason exists for basing criminal liability on a defendant's subjective belief about whether the bank itself owns the property targeted by a fraudulent scheme

Petitioner appears to suggest that whether the property targeted by a scheme is, in fact, bank-owned property does not control whether Section 1344(1) should apply. Petitioner instead appears to contend that Section 1344(1) requires that the scheme target property that the defendant himself *believes* is owned by the bank. See, *e.g.*, Br. 17 n.8 (arguing that "the *object* of the scheme," and "not whether a bank in fact owns the property," controls); Br. 45 (arguing that a scheme to target property owned by a bank's customer "is not a scheme to target property 'owned by' the bank, *absent contrary evidence of intent*") (emphasis added). That position does not rationally advance an interest in protecting the financial integrity of banks, nor does it distinguish between criminal and non-criminal intent.

Congress would have had no reason to prohibit only those schemes in which the schemer *believes*—rightly or wrongly—that the bank holds an ownership interest in the property targeted by the scheme. It is a question of federal law whether something targeted by a scheme qualifies as a "property" interest protected by the federal fraud statutes. *Cleveland*, 531 U.S. at 25 n.4. Yet none of this Court's decisions discussing the "property" interests protected by those statutes (*e.g.*, *McNally*, *Carpenter*, *Cleveland*, *Pasquantino*) suggests that the scope of a federal fraud statute's reach depends on the defendant's subjective belief about whether that thing is a "property" interest in

the hands of the victim. Petitioner offers no sound reason for such a strange liability regime.

A layperson's (likely non-existent) beliefs about the legal status of property interests do not sensibly differentiate "criminal from non-criminal conduct." See *United States* v. *Nkansah*, 699 F.3d 743, 757 (2d Cir. 2012) (Lynch, J., concurring in part and concurring in the judgment in part). Even if a fraudster, like many citizens (and even quite a few lawyers), lacks expertise in property law, he can possess the requisite knowledge that he is seeking to deprive a bank of property through deception. Petitioner, for example—like the fraudster that Judge Lynch described in *Nkansah*—undoubtedly "had a criminally fraudulent intent," because "[h]is goal was to get money to which he was not entitled, with no intention of paying it back." *Ibid.* Even petitioner admits his conduct—directing false representations to banks to get money in a customer's account—could be charged under federal criminal law, just not under Section 1344(1). See Br. 11, 13, 44-46 & nn.18-19 (admitting that petitioner's scheme reflects "the paradigmatic" violation of Section 1344(2), and might also be chargeable under the mail- and wire-fraud statutes).

Similarly, an individual's beliefs about the scope of the bank's ownership interests have no bearing on the threat to the banking system posed by schemes that target money or property held by a bank. See pp. 27-29, *supra*. A schemer's belief that he is only targeting an account holder does not alleviate the financial consequences if, as a regulatory matter, the bank must bear the loss, or elects as a matter of customary banking practice to do so. Limiting Section 1344(1) to only those bank-fraud schemes that target money in a bank

for which (the schemer believes) the bank has an ownership interest would threaten to produce arbitrary results by introducing a new proof requirement that simply creates uncertainty about the proper basis under which to charge conduct.

5. Petitioner's bank-owned property theory is a particularly anomalous one to apply in the banking context

Petitioner argues (Br. 13, 41-47) that his theory would not be disruptive because many types of bank-fraud schemes might be prosecuted under Section 1344(2) rather than Section 1344(1). But that observation does not assist him. The "substantial" overlap between the two clauses means that the ability to prosecute under one is not a reason to truncate the other. See *Loughrin*, 134 S. Ct. at 2390 n.4. And creating uncertainty about that zone of overlap only would result in either duplicative charging or windfalls for defendants like petitioner. In any event, petitioner's bank-owned property theory is particularly anomalous as applied to bank deposits. A scheme targeting a customer's deposit account is one that targets funds that, as a legal matter, are owned by the bank. Petitioner's theory thus appears to rest on a fundamental misunderstanding of the banking system, and it illustrates the pitfalls of tying liability under Section 1344(1) to technical property distinctions.

a. "All deposits made with bankers may be divided into two classes," known as general and special deposits. *Marine Bank* v. *Fulton Bank*, 69 U.S. (2 Wall.) 252, 256 (1865); see 5C *Michie on Banks and Banking*, ch. 9, § 328, at 187-188 (2015) (*Michie*).

i. A "[g]eneral [d]eposit" reflects the ordinary "relation[ship] between a bank and its depositor." 5A

Michie ch. 9, § 1, at 1 (2014). As such, a "deposit of money in a bank in the ordinary course of business is presumed to be [a] general [deposit]" "[i]n the absence of evidence to the contrary." 5C *Michie* ch. 9, § 328, at 193; accord *Dean Witter Reynolds, Inc.* v. *Variable Annuity Life Ins. Co.*, 373 F.3d 1100, 1107 (10th Cir. 2004) (McConnell, J.).

When a banking customer makes a normal (general) deposit with a bank, the depositor "parts with the title to his money" and ownership of the deposit vests immediately with the bank. *Phoenix Bank* v. *Risley*, 111 U.S. 125, 127 (1884) (citations omitted) (describing "settled doctrine"); accord *Burton* v. *United States*, 196 U.S. 283, 302-303 (1905); *Crocker-Citizens Nat'l Bank* v. *Control Metals Corp.*, 566 F.2d 631, 637 (9th Cir. 1977); see 5A *Michie* ch. 9, § 38, at 162 ("[A] general deposit passes title to the financial institution."). "The money deposited [then] becomes part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to [other] customers, and parted with at the will of the bank." 5A *Michie* ch. 9, § 1, at 3-5. "[T]he bank becomes the debtor of the depositor," and it "repay[s] the [debt] on [the depositor's] demand or order" by, for instance, "honoring checks drawn against the deposits." *Id.* at 6-7, 24; see *Bank of Marin* v. *England*, 385 U.S. 99, 101-102 (1966). Thus, if the depositor can "draw[] a draft against the account," "[t]he fact that a fund may be checked upon implies that it is a general deposit." 5C *Michie* ch. 9, § 334, at 237; see *Jensen* v. *State Bank of Allison*, 518 F.2d 1, 4 n.3 (8th Cir. 1975) ("A checking account is an account of general deposit.") (citing *Kruger* v. *Wells Fargo Bank*, 521 P.2d 441, 444 n.5 (Cal. 1974)).

Such deposits are "an important part of the business of banking" because the money deposited "become[s] part of [the bank's] general funds" and therefore "can be loaned by [the bank] as other moneys." *Bank of the Republic* v. *Millard*, 77 U.S. (10 Wall.) 152, 155 (1870). The bank is able to secure "the right to use [the deposited funds] for [its] own profit" only because it obtains ownership of (*i.e.*, "title to") the deposit. See *Phoenix Bank*, 111 U.S. at 127 (citation omitted). If a depositor were to retain ownership, the bank would be unable to spend the funds to finance its operations. And "in return for loaning money to [the] bank so that [the] bank may use [the deposited] funds for its own investments," the "depositor [often] receives interest" on the balance of his account. 5A *Michie* ch. 9, § 38, at 166. The "[f]act that [a] bank pays interest on [an] account" is therefore "very strong evidence that title to [the] money deposited" has passed to the bank. *Ibid.*; accord *Scammon* v. *Kimball*, 92 U.S. 362, 370 (1876).

ii. The other form of deposit—a "special deposit"—is a "deposit for safekeeping, to be returned intact on demand, or for some specific purpose not contemplating a credit on [a] general account." 5C *Michie* ch. 9, § 328, at 200. A special deposit must be "made under an express or clearly implied agreement that it is for some particular purpose" for which the bank "merely assumes charge or custody without authority to use the deposit" in its own dealings. *Id.* at 199, 202-203. The bank thereby "becomes a [type of] bailee" with possession of the deposit, while "title remains in the depositor." *Id.* at 203-204; see *Scammon*, 92 U.S. at 370 ("[T]he bank becomes bailee of the depositor" with respect to special deposits); *Marine Bank*, 69 U.S. at

256 (explaining that "the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter"). As a result, if a bank receives a special deposit, the bank is prohibited from "mingl[ing] the deposit with its general assets" as it could with a general deposit. 5C *Michie* ch. 9, § 328, at 200-201. Cf. Richard A. Lord, *The Legal History of Safekeeping and Safe Deposit Activities in the United States*, 38 Ark. L. Rev. 727 (1985) (discussing history of "special deposit" services in the form of bank safe deposit boxes and safekeeping services).

b. The fact that bank funds used to originate loans or pay overdrafts in check-kiting schemes are the same bank-owned funds that banks obtain from a customer's general deposits illustrates that petitioner's position is based on a basic misunderstanding of the banking system. If, as petitioner suggests (Br. 13, 42-43), loan-fraud and check-kiting are covered by Section 1344(1), then so too are schemes targeting funds in a customer's account. Indeed, petitioner's attempt to distinguish bank-customer property from bank-owned property does not even work in the context of this case.[8] And, more broadly, the distinctions

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[8] The evidence demonstrates that petitioner's scheme targeted money that BoA owned. The BoA account from which petitioner drained over $300,000 was a checking account in Hsu's name, Gov't Ex. 1, at 4-5 (bank statement); cf. C.A. E.R. 495, thus indicating that the account was a "general deposit" account, 5C *Michie* ch. 9, § 334, at 237. Petitioner's ability to order 39 separate electronic fund transfers out of the account to PayPal, see p. 3, *supra*, similarly reflects that Hsu's account was a general deposit account, not one for a special purpose. Finally, the BoA statements show that BoA paid monthly interest to Hsu on his checking account. See, *e.g.*, Gov't Ex. 1, at 4-5, 7-8, 10-11, 13-14. Those payments are "very strong evidence" that the account was a general deposit

among the various types of accounts have no relation to the purpose of the bank-fraud statute to protect banks against deceptive schemes. Accordingly, petitioner's "bank-owned property" test should be rejected.[9]

C. Section 1344(1) Requires Proof Of An Intent To Deceive A Bank, Not To Cause It Monetary Loss

Petitioner's proposed jury instructions focused not on whether the charged scheme targeted bank-owned property, but on whether the scheme was designed to victimize the banks by causing monetary loss, and whether petitioner had acted with the "intent to

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account and that BoA held "title to the money" deposited therein. *Scammon*, 92 U.S. at 370. Nothing in the record undermines the legal conclusion that the BoA did, in fact, have title to the money targeted in petitioner's scheme.

[9] As a final submission, petitioner invokes (Br. 40-41) the rule of lenity, but that invocation is misplaced. The rule of lenity is a tie-breaking rule of statutory construction that applies only if, "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity or uncertainty in the statute," *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (citations and internal quotation marks omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of th[e] rule," *Muscarello*, 524 U.S. at 138. Instead, the rule of lenity applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Ibid.* (citations and internal quotation marks omitted); see *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000). Because petitioner's position cannot be squared with the text and structure of Section 1344(1), as informed by the common-law understanding of fraud and the intended role of the bank-fraud statute, the rule of lenity has no application here.

deceive and cheat" the banks "in order to expose" them to "monetary loss." J.A. 22-25. To the extent that petitioner continues to press that specific-intent argument—the only one he properly preserved—it lacks merit.

Petitioner acknowledges (Br. 17 n.8) that Section 1344(1) does not require a showing that a fraudulent scheme caused a bank "actual damage[]" or posed any actual "risk of financial loss" to the bank. Rather, petitioner made clear at the certiorari stage that "[his] position [wa]s not that [Section] 1344(1) requires proof of 'risk of loss,' * * * but rather proof that the defendant *intended* to expose the bank to actual or potential loss." Pet. 23. Petitioner is incorrect. Section 1344(1)'s text and drafting history, and practical consequences, make clear that Congress included no requirement that the defendant intend to harm a bank.

1. Section 1344(1)'s text and drafting history are incompatible with an intent-to-harm-the-bank requirement

a. Section 1344(1)'s prohibition against executing of a scheme "to defraud a financial institution," 18 U.S.C. 1344(1), does not include an intent-to-harm-the-bank requirement. Congress's use of the phrase "scheme to defraud" incorporates the intent required in a common-law action for fraud. See *Neder*, 527 U.S. at 23 (construing this phrase by applying the presumption that "Congress intends to incorporate the well-settled meaning of common-law terms it uses").

That mental state is a culpable intent to "deceive," not to harm.[10]

The central feature of fraud has always been "deception or trickery." *Husky Int'l Elecs., Inc.* v. *Ritz*, 136 S. Ct. 1581, 1586 (2016). Justice Story explains that "fraud" was understood as early as Roman times to include "any cunning, deception, or artifice, used to circumvent, cheat, or deceive another." 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 186, at 219 (6th ed. 1853). By the Founding, Story observes, Pothier similarly described the concept as "appl[ying] to every artifice made use of by one person for the purpose of deceiving another." *Ibid.* That focus on deception underlies the common law's definition of fraudulent intent.

An intent to defraud at common law was an "[i]ntent to [d]eceive." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 107, at 741 (5th ed. 1984) (*Prosser on Torts*) (emphasis omitted) (explaining that the requisite mental element was "the intent to de-

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[10] In multi-member fraud schemes, different actors may have different roles and different intentions with respect to execution of the scheme. *Cf. Ocasio* v. *United States*, 136 S. Ct. 1423, 1429 (2016) (conspiracy liability requires a defendant to harbor the "'specific intent that the underlying crime be committed' by some member of the conspiracy," not that he agreed to commit it himself) (emphasis and citation omitted). See generally *United States* v. *Joyce*, 499 F.2d 9, 17 (7th Cir.) (joining "at least six other circuits in applying conspiracy principles to a multimember mail fraud scheme"), cert. denied, 419 U.S. 1031 (1974). The *scheme* must be designed to deceive; but an individual schemer working with a group may be liable based on his knowledge of the scheme's objective whether or not he had a purpose to deceive. Of course, in a single-actor bank-fraud scheme, proof of the scheme and the defendant's intent will almost always converge.

ceive, to mislead, to convey a false impression"). In other words, the intent required to establish an action for fraud was an "intent[] to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation." *Id.* § 105, at 728; see Restatement (Second) of Torts § 525 (1976) ("One who fraudulently makes a misrepresentation * * * for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit."); 2 C.G. Addison, *Wrongs and Their Remedies: A Treatise on the Law of Torts* § 1174, at 1004 (4th ed. 1876) (*Addison on Torts*) ("[I]f a falsehood be knowingly told, with an intention that another person should believe it to be true, and act upon it, * * * the party telling the falsehood is responsible in damages in an action for deceit.").[11] As a result, under common law, "culpability" for misrepresentations was based on the mere existence of an "intent to deceive, to mislead, [or] to convey a false impression."[12] *Prosser on Torts* § 107, at 741.

Although a fraudster's "intent to accomplish an ultimate purpose" of his scheme—such as an intent to "harm" the victim—was sometimes relevant at com-

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[11] See also 37 Am. Jur. 2d *Fraud and Deceit* § 109, at 146-148 (2013) (describing "fraudulent intent" as "an intent to deceive or mislead"); 37 C.J.S. *Fraud* § 42, at 225 (2008) (explaining that "an essential element of fraud is that there must be a fraudulent intent, an intent to deceive, or the equivalent thereof," and equating such intent with "[a] specific intent to defraud") (footnotes omitted).

[12] The common law also required proof of damages resulting from the fraud. See *Neder*, 527 U.S. at 25. As noted above, however, that requirement "ha[s] no place in the federal fraud statutes," which more broadly prohibit a "'scheme to defraud,' rather than [a] completed fraud." *Ibid.*

mon law, it was relevant *only* to whether punitive damages were warranted, not to whether the defendant had "culpab[le]" intent. *Prosser on Torts* § 107, at 741; see, *e.g.*, 2 *Addison on Torts* § 1175, at 1005 ("In order to maintain an action for deceit, * * * it is not necessary to prove that the false representation was made from * * * a wicked motive of injury to the plaintiff."); Melville M. Bigelow, *A Treatise on the Law of Fraud on Its Civil Side* 538-539 (1888) ("[I]t is not necessary, even in an action for damages, for the plaintiff to prove that the defendant intended to injure him."); Henry T. Terry, *Intent to Defraud*, 25 Yale L.J. 87, 99 (1915) (explaining that the "maker of the representation * * * need not intend to cause any actual harm or loss"). Thus, just as "common-law fraud has no additional 'intent to harm' requirement," *United States* v. *Kenrick*, 221 F.3d 19, 28 (1st Cir.) (en banc), cert. denied, 531 U.S. 961, and 531 U.S. 1042 (2000), abrogated in part on other grounds by *Loughrin*, 134 S. Ct. at 2388 n.2, neither does Section 1344(1).

Indeed, the absence of an intent-to-harm requirement in Section 1344(1) is strongly supported by this Court's decision in *Carpenter*, *supra*, which upheld fraud convictions under the mail- and wire-fraud statutes on which Section 1344(1) was based. The defendants there schemed to use non-public information obtained from a newspaper to purchase stocks whose price would be affected upon publication of the information, but they neither intended to cause the newspaper monetary harm nor in fact did so. 484 U.S. at 22-26. *Carpenter* thus indicates that no similar intent-to-harm requirement should be read into Section

1344(1). Cf. *Loughrin*, 134 S. Ct. at 2389 (rejecting "extra-textual limit on" Section 1344 (2)'s "compass").

b. An intent-to-harm requirement would also be inconsistent with Section 1344(1)'s drafting history, which demonstrates that Congress rejected language that would have required proof of intent to harm a bank.

After the Senate passed the Comprehensive Crime Control Act bill (S. 1762, 98th Cong.) containing the text ultimately enacted as Section 1344, see 130 Cong. Rec. 1587, 1636-1637 (1984); *Senate Report* 377-379, 772; cf. 18 U.S.C. 1344 (1988), a House subcommittee hearing addressed the relevant portions of S. 1762 and a competing House measure (H.R. 5405). *Financial Bribery and Fraud: Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984). The House bill was narrower than its Senate counterpart, defining a Section 1344 offense as knowingly "devis[ing] *a plan* to obtain the property of a national credit institution, or *to cause economic loss* to such an institution by fraudulent means." *Id.* at 19 (emphasis added). The Department of Justice "strongly urge[d]" the subcommittee "to follow the format in * * * S. 1762" because, the Department explained, Section 1344 should be given "broader coverage" and the Senate text was "modeled on the present mail and wire fraud statutes deliberately to incorporate [the] existing case law," which did not limit the offenses to "situations where the object of the fraud is to obtain money or inflict an economic loss." *Id.* at 4, 12.

The House bill was later reported as a clean bill (H.R. 5872) with revisions to "address[] some of the Justice Department's concerns" by adopting S. 1762's

language so as "to incorporate case law" giving "expansive interpretations" to the mail- and wire-fraud statutes. H.R. Rep. No. 901, 98th Cong., 2d Sess. 3-4 (1984). The House passed that bill, which deleted the earlier text addressing schemes "to cause economic loss to [a bank]." See 130 Cong. Rec. at 21,492-21,493.[13] Congress thereby rejected the very requirement that petitioner has advocated: a requirement that the scheme be intended to cause harm to a bank.

2. An intent-to-harm-the-bank requirement is unsound

a. An intent-to-harm-the-bank requirement would serve no evident legislative goal. To the extent petitioner believes that Congress enacted Section 1344(1) in part to protect the financial integrity of banks, cf. Br. 39, it would not be practicable in criminal prosecutions to distinguish between the risks posed to banks by different types of schemes designed to obtain money held by a bank. Attempting to do so would implicate technical issues of banking law governing which parties bear the loss in particular types of transactions. And basing criminal liability on a defendant's

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[13] The House-passed version of Section 1344(2) remained narrower than the Senate measure because it did not include text targeting schemes to obtain non-bank-owned property "under the custody or control" of a bank. See 130 Cong. Rec. at 21,492. Proponents of the Senate's broader approach thus inserted the Senate-passed text of S. 1762 (introduced as H.R. 5963) into pending legislation (H.R. J. Res. 648) that the House passed. 130 Cong. Rec. at 26,780-26,781, 26,834-26,838; see *id.* at 26,727-26,728. After the Senate concurred with amendments not relevant here, H.R. Conf. Rep. No. 1159, 98th Cong., 2d Sess. 415-419 (1984), Section 1344 was enacted into law. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, § 1108(a), 98 Stat. 2147.

understanding of whether a bank or another entity would be exposed to loss is an even less sensible standard. Such an intent-to-harm-the-bank requirement would lead to arbitrary results in prosecutions having no relationship to actual criminal culpability or to the risks posed to the banking sector by such schemes. See pp. 27-32, *supra*.

Rules governing the allocation of loss from fraud, moreover, depend on the nature of the fraudulent transaction. The rules for determining a bank's liability for a fraudulent check after the bank has honored it, for instance, are set forth in the Uniform Commercial Code, as incorporated into state law. See *J. Walter Thompson, U.S.A., Inc.* v. *First BankAmericano*, 518 F.3d 128, 131 n.2 (2d Cir. 2008). A leading treatise describes the material in its chapter on "Basic Liability Arising from Stolen Instruments and Forged Signatures" as "abstract, difficult, and interrelated," and "'for adults only.'" 2 James J. White et al., *Uniform Commercial Code* § 19:1, at 311, 318 (6th ed. 2013); see *id.* at 313 (explaining that "[t]heft, forgery, and alteration of negotiable instruments have generated thousands of litigated cases"). Another treatise has multiple chapters discussing the liability rules for check kiting, check fraud via forged and counterfeit checks, check fraud by alteration, and check fraud through forged indorsements. 2 Barkley Clark & Barbara Clark, *The Law of Bank Deposits, Collections and Credit Cards*, Chs. 9-12 (3d ed. 2016). Most of these detailed rules are foreign to "anyone but a small cadre of bankers, banking lawyers, and law professors." *Nkansah*, 699 F.3d at 760 (Lynch, J., concurring in part and concurring in the judgment in part). Such complexities would make it impracticable to adminis-

ter in principled fashion a criminal prohibition that bases guilt on the risk of loss that a fraudulent scheme would pose to a bank.

b. Petitioner has argued (Pet. 23-24) that his focus on the defendant's intent to harm a bank would not entangle courts in "technical issues of banking law" because the bank's actual risk of loss is irrelevant. Petitioner illustrated his point by arguing (Pet. 23) that the jury could infer intent, for instance, when evidence shows that a bank was "obligated to pay a cashier's check written on non-sufficient funds." But such evidence not only directly implicates "technical issues of banking law," it does so through the even less sensible lens of a criminal defendant's inferred knowledge of such law.

Indeed, an intent-to-harm requirement would draw a distinction between *identical* fraudulent schemes based on whether the defendant desired to inflict the loss on the bank, or was merely indifferent about who would bear the loss. But the dangers posed by bank-fraud schemes targeting money in the custody or control of banks in no way depend on a schemer's "anti-bank animus." *Nkansah*, 699 F.3d at 760 (Lynch, J., concurring in part and concurring in the judgment in part). "A scheme that is intended to harm third parties may, in fact, end up hurting the bank," J.A. 55, even if "the perpetrator *believes* [it] will damage only some other party," *Nkansah*, 699 F.3d at 759 (Lynch, J., concurring in part and concurring in the judgment in part). Likewise, a scheme "*intended* to harm a bank may in the end impose no costs on the institution if the schemer misunderstands who will be responsible for the loss." *Ibid.* The danger to a bank is posed by the nature of the fraudulent

scheme itself, which targets money held by the bank. No good reason exists why Congress would have wanted bank-fraud liability to turn on the schemer's purposes on these issues.

D. Petitioner's Remaining Challenges To The Jury Instructions Lack Merit

The jury instructions in this case correctly conveyed the elements of bank-fraud under Section 1344(1). The district court instructed that a Section 1344(1) offense requires proof of "a scheme to defraud a financial institution as to a material matter," J.A. 17, and that a "scheme to defraud" is "any deliberate plan of action or course of conduct" (a scheme) "by which someone intends to deceive, cheat, or deprive a financial institution of something of value" (to defraud), J.A. 18. By instructing that the scheme must be a scheme to defraud a bank "as to a material matter," J.A. 17, the court made clear that the scheme must be one to defraud the bank on a matter that has "a natural tendency to influence or is capable of influencing [the] financial institution to part with money or property," J.A. 18 (defining "material matter"). In other words, the scheme must be one "to deceive, cheat, or deprive a financial institution of something of value" by employing deception on a material matter that would naturally lead the bank "to part with money or property." J.A. 17-18. Those instructions embody the meaning of a "scheme to defraud" in this context.

Petitioner contends (Br. 22-23) that the jury instructions erroneously permitted the jury to convict him "without finding any intent to deprive th[e] bank * * * of property" because, petitioner argues, the instructions used the disjunctive "or" when defining a "scheme to defraud" as one to "deceive, cheat, *or*

deprive a financial institution of something of value," J.A. 18 (emphasis added). Petitioner misreads the instructions. The relevant instructional phrase uses a "financial institution" as the direct object of all three verbs—deceive, cheat, and deprive. The prepositional phrase that immediately follows ("of something of value") thus necessarily applies to each verb as well. The instruction thus conveyed that the scheme must be one to "deceive" the bank out of "something of value," "cheat" the bank out of "something of value," or "deprive" the bank of "something of value." Each alternative requires a finding that the scheme be designed (intended) to take property (something of value) from the bank. And by further requiring that the scheme be one to defraud a bank as to a "material matter" that would naturally lead the bank "to part with money or property," J.A. 17-18, the instructions confirm that the jury must find that the scheme's objective was to take property from a bank. Cf. *United States* v. *Park*, 421 U.S. 658, 674 (1975) ("[J]ury instructions * * * 'must be viewed in the context of the overall charge.'") (citation omitted).

Petitioner similarly contends (Br. 15, 22-23) that the district court's instruction requiring proof of intent to "deceive or cheat," J.A. 19, should have required proof of intent to "deceive *and* cheat," J.A. 22 (emphasis added) (petitioner's proposed intent-to-defraud instruction). But "deceive" and "cheat" have long been understood to reflect alternative verbal formulations for describing fraudulent conduct. See, *e.g.*, *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1172 (2012) (citing definition of "deceit" as "the act or process of deceiving (as by falsification, concealment, or cheating)") (citation omitted); William C. Anderson, *A*

Dictionary of Law 474 (1893) ("Defraud" means "[t]o cheat; to deceive; to deprive of a right by an act of fraud."); 1 Alexander M. Burrill, *A Law Dictionary and Glossary* 658-659 (2d ed. 1871) (defining "fraud" as "[a]ny cunning, deception or artifice, used to circumvent, cheat or deceive another") (capitalization omitted). The leading federal jury-instruction manual employs same the disjunctive phrasing, 2A Kevin F O'Malley et al., *Federal Jury Practice and Instructions* § 47:14, at 470 (6th ed. 2009), and petitioner cites no court or commentator deeming that formulation deficient. Accordingly, as the court of appeals correctly held, the jury instructions captured the elements of bank fraud in violation of Section 1344(1).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 20 provides:

Financial institution defined

As used in this title, the term "financial institution" means—

(1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);

(2) a credit union with accounts insured by the National Credit Union Share Insurance Fund;

(3) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;

(4) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971;

(5) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);

(6) a depository institution holding company as (defined[1] in section 3(w)(1) of the Federal Deposit Insurance Act;

(7) a Federal Reserve bank or a member bank of the Federal Reserve System;

(8) an organization operating under section 25 or section 25(a) of the Federal Reserve Act;

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[1] Per original.

(9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978); or

(10) a mortgage lending business (as defined in section 27 of this title) or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974.

2. 18 U.S.C. 1341 provides:

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

3. 18 U.S.C. 1343 provides:

Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

4. 18 U.S.C. 1344 provides:

Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

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In The Supreme Court of the United States

LAWRENCE EUGENE SHAW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR THE PETITIONER

This case is about the requisite *intent* to "defraud a financial institution" under 18 U.S.C. § 1344(1), particularly as it applies to schemes to obtain customer deposits. Raising the specter of trials mired in banking-law technicalities, the government tries to shift the focus to whether a bank in fact owns customer deposits or suffers loss from such schemes. But clause (1), like clause (2), avoids these issues by conditioning culpability solely on the defendant's intent – not on the actual legal status of property or the scheme's effect on the bank. And technicalities aside, in practice, Congress, this Court, and the average person view deposits not as bank-owned property but as customer assets entrusted to the bank for safekeeping. Because deposits are commonly understood as customer property, a defendant who schemes to obtain deposits presumptively intends to target the customer, not the bank, as the financial victim of the fraud, regardless of whether the bank suffers loss in fact. Clause (2), not clause (1), is the appropriate charge in such a case.

Against this backdrop, there are two disputes about what clause (1)'s intent-to-defraud-a-bank element entails. The first question is whether this element requires intent *both* to deceive the bank *and* to thereby wrong the bank's property rights. Although the government concedes, based on the undisputed definition of "defraud," that a clause (1) scheme must be designed to do both of these things, it asserts that the only intent required is intent to deceive the bank. The plain language of clause (1) and this Court's precedent

refute that position. Therefore, the Ninth Circuit erred in approving jury instructions that permitted a conviction based on intent to deceive alone.

The second question is whether, in customer-deposit schemes, the requisite intent to wrong a bank's *own* property rights means intent that the bank – not its customer – bear the monetary loss of the fraud. The government suggests that clause (1) applies to customer-deposit schemes, even without such proof, because the bank *in fact* has "ownership" or "possessory" interests in bank-held funds. This position ignores that the gravamen of § 1344 is intent. Whatever the actual status of the targeted property, clause (1) requires proof that the defendant *intended* that the bank, not its customer, be the financial victim of the fraud. Put differently, the intent must be to obtain bank-owned money rather than the customer's bank-held funds.

The government's position that a scheme designed to obtain *customer* deposits reflects intent to "defraud *a financial institution*" is also at odds with the Court's fraud precedent. In nearly a century of jurisprudence, the Court has tethered the concept of "defraud" to inflicting pecuniary or property loss on the victim. It has also held that, where a fraud statute designates a particular victim, a defendant must intend to harm *that* victim, not a third party. Because clause (1) designates "a financial institution" as the requisite victim of the scheme, intent to defraud *a financial institution* requires intent to cause pecuniary or property loss *to the bank* – not its customer.

Section 1344's structure supports this interpretation. Consistent with the common understanding of bank-held customer deposits as distinct from bank-owned property, clause (2) expressly distinguishes between (and covers) two different types of schemes: those where the defendant intends to obtain bank-held property, and those where the defendant intends to obtain bank-owned property. In this context, clause (1)'s requisite intent to wrong a bank's *own* property rights equates to clause (2)'s requirement of intent to obtain bank-*owned* property; it does not include the distinct intent to wrong a *customer's* property rights in bank-held deposits. So construed, § 1344 achieves Congress's goal to reach all bank-fraud conduct – a fact the government never disputes.

I. The defendant's *intent* – not the actual status of property or the impact of the completed fraud – is 18 U.S.C. § 1344(1)'s "whole sum and substance."

Section 1344 punishes the *scheme* to defraud – not the completed fraud. Pet. Br. 16-17; U.S. Br. 13. Accordingly, clause (1)'s "whole sum and substance" is the defendant's *intent* to defraud a bank. *Loughrin v. United States*, 134 S. Ct. 2384, 2389-90 (2014).

Clause (1)'s exclusive focus on the defendant's intent – irrespective of the actual status of property or the impact of the completed fraud – is consistent with how the Court has long interpreted § 1344's predecessor mail- and wire-fraud statutes. In the first of those

decisions, the Court emphasized that "[p]unishment because of the fraudulent purpose is no new thing." *Durland v. United States*, 161 U.S. 306, 313 (1896). "The significant fact is the intent and purpose" of the scheme to defraud. *Id.* A century later, the Court reaffirmed this principle. *See Pasquantino v. United States*, 544 U.S. 349, 371 (2005) (quoting *Durland*). Thus, the fraud statutes punish "intentional *efforts* to despoil" – not the actual effect of the defendant's conduct. *Durland*, 161 U.S. at 314 (emphasis added); *see also id.* at 313 (hypothetical scheme to obtain goods bought on credit without intent to cheat not covered even if vender suffered loss).

Consistent with this precedent, *Loughrin* held that § 1344's prefatory scheme-or-artifice text required proof, under clause (2), "that the defendant *intend* to obtain" either of two specified types of property: bank-owned *or* bank-held. 134 S. Ct. at 2388-89 (emphasis added) (internal quotation marks omitted). Given clause (2)'s "requisite intent," the Court observed, a defendant may claim that he "did not intend" to obtain bank-owned or bank-held property but rather property from a non-bank victim. *Id.* at 2393 n.6; *see also id.* at 2389 n.3 (jury rejected claim that defendant merely intended to obtain store's property). Like clause (2), clause (1) conditions liability on intent to obtain a specific type of property – bank-owned – regardless of the actual status of the property. *See infra* Part III. Shaw's construction of clause (1) is thus fully consistent with this Court's approach to clause (2), its mail- and wire-fraud precedent, and general criminal-law principles.

See Clark v. Arizona, 548 U.S. 735, 766 (2006) (noting "modern tendency has been toward more specific descriptions" of intent requirements); *Morissette v. United States*, 342 U.S. 246, 250-51 (1952) (basing culpability on intent is "universal and persistent in mature systems of law").

The government acknowledges that § 1344's focus on the scheme means that damages a bank may suffer from a "completed fraud" have "no place" in a bank-fraud prosecution. U.S. Br. 13 (quoting *Neder v. United States*, 527 U.S. 1, 24-25 (1999)) (internal quotation marks omitted). But its extensive discussion of the legal relationship between a bank and customer deposits concerns just that: the potential impact of a completed fraud. U.S. Br. 27-29 & nn.5-7, 31-36 & n.8, 43-45. Shaw does not dispute that a general deposit passes title to the bank, or that the bank may suffer loss from a customer-deposit scheme. The question is not the legal status of deposits or bank loss *in fact*, however. Under clause (1), like clause (2), liability turns on the defendant's *intent* to obtain specific property.

Congress's focus on the intent behind the bank-fraud scheme – rather than its effect – makes good sense. There are other statutes that focus on the effect of bad conduct on the bank. For example, both the mail- and wire-fraud statutes provide heightened penalties equivalent to those found in § 1344 for schemes to defraud *anyone* that merely "affect[] a financial institution." 18 U.S.C. §§ 1341, 1343. Likewise, the bank-larceny statute penalizes the taking of either bank-owned or bank-held property. 18 U.S.C. § 2113(b). But

Congress enacted § 1344 in part to fill gaps created by that statute's requirement of a completed taking. Pet. Br. 37 (discussing *Bell v. United States*, 462 U.S. 356 (1983), as a catalyst for § 1344). In drafting § 1344, Congress thus focused on the defendant's intent, not the effect of his conduct. As a result, if the legal status of property or bank loss is ever relevant to a clause (1) prosecution – and, in most cases, it is not – it, at best, sheds light on whether the defendant acted with the requisite intent. *See infra* Part III.C.

II. The intent to defraud required by clause (1) includes *both* intent to deceive the bank *and* intent to cheat the bank by wronging the bank's *own* property rights.

The plain text of clause (1) requires intent *both* to deceive the bank *and* to wrong the bank's property rights. The government's contrary (and new) argument that the statute requires only intent to deceive is unfounded. Therefore, the Ninth Circuit erroneously approved instructions that allowed a conviction based on intent to deceive alone.

A. The plain text of clause (1) requires applying the requisite intent to both components of the undisputed definition of "defraud."

The applicable and undisputed definition of "defraud" found in *Hammerschmidt v. United States*, 265 U.S. 182 (1924), is to "cheat" the victim "out of property

or money" – in other words, (i) "wronging one in his property rights" (ii) "by dishonest methods or schemes." *Id.* at 188. Pet. Br. 18-23; U.S. Br. 18. It necessarily follows that a defendant intends to "defraud" a bank for purposes of clause (1) only if he intends *both* to deceive the bank *and* to wrong the bank's property rights. But the government now contends that clause (1) requires *only* intent to deceive. U.S. Br. 36-42. That argument conflicts with its concession when opposing certiorari: "A scheme to defraud a bank . requires proof of an intent to deprive the bank of something of value by deception[.]" Brief in Opposition at 11; *see also* Pet. Br. 22 & n.13 (noting this concession). Its new contrary position cannot be reconciled with § 1344's plain language.

First, the government still agrees that clause (1) reaches only "schemes designed to deprive a bank of a property interest by deceiving the bank." U.S. Br. 17 & n.1. The government never explains how a defendant may *design* such a scheme without *intending* to accomplish its objective. To the contrary, the government recognizes that "in a single-actor bank-fraud scheme, proof of the scheme and the defendant's intent will almost always converge" – that is, the scheme's design reflects intent and vice versa. U.S. Br. 38 n.10. Therefore, the government's concession that the scheme must be designed *both* to deceive the bank *and* to thereby deprive a bank of a property interest is an implicit acknowledgment that the defendant must intend to do both of those things.

Second, ordinary English grammar and logic compel applying clause (1)'s intent-to-defraud element to both components of "defraud." If conduct X consists of acts A and B, then a defendant does not intend to X unless he *both* intends to A *and* intends to B. *See, e.g.*, *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014) (aiding-and-abetting requirement of intent to facilitate offense "must go to the specific and entire crime charged" and thus "to the full scope" of a crime with multiple action elements).

Finally, in *Loughrin*, the Court held that § 1344's prefatory scheme-or-artifice language, as applied to clause (2), requires intent to obtain the specified property. 134 S. Ct. at 2388-89. Naturally, the same prefatory language, as applied to clause (1), requires the intent to wrong the bank's property rights called for by the undisputed definition of "defraud" and the rules of grammar.

B. The government's position that clause (1) requires only intent to deceive rests upon a misunderstanding of this Court's precedent.

Although the government concurs in the *Hammerschmidt* definition of defraud, U.S. Br. 18, it contends that Congress, by using the phrase "scheme to defraud," meant to incorporate the intent required for a common-law civil fraud action – which it asserts is intent to deceive, not to harm. U.S. Br. 37-41. That is incorrect.

First, the government's reliance on *Neder v. United States*, *supra*, is misplaced. That case applied the canon of construction on imputing the common-law meaning of a term unless the statute dictates otherwise. 527 U.S. at 21-22. In accordance with this canon, Shaw applied the well-established, and now undisputed, *Hammerschmidt* definition of "defraud" to clause (1). Pet. Br. 21-22. Contrary to what the government suggests, U.S. Br. 37, *Neder* does not hold that interpretation of the federal fraud statutes is dictated by the common-law *tort* of fraud. Rather, it instructs that civil-fraud law may be useful when addressing questions not answered by the statutes' text, but even then only to the extent that tort principles are not "incompatible" with that language. *Neder*, 527 U.S. at 21-25. Because applying the settled definition of "defraud" to clause (1)'s undisputed intent-to-defraud element clearly establishes the requisite intent here, there is no need to consult civil-fraud law at all.

In any event, civil-fraud law supports rather than refutes Shaw's plain-meaning interpretation of clause (1). The government misreads the authorities it cites to require *only* intent to deceive, even as it acknowledges that these sources require something *more*: namely, proof that the defendant intended to induce the plaintiff to act upon the misrepresentation. U.S. Br. 38-39 & n.11. *See, e.g.*, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 105, at 728 & § 107, at 741 (5th ed. 1984) ("scienter" requires that defendant intend plaintiff both to believe misrepresentation

and to act upon it in a certain way). That civil law requires *some* intent beyond intent to deceive belies the government's claim that *only* intent to deceive is required under clause (1).

The government also contends that clause (1) cannot require intent to harm because a civil action does not require such intent. U.S. Br. 39-40. At the same time, however, it acknowledges that a civil-fraud claim requires actual harm. U.S. Br. 39 & n.12. Clause (1), by contrast, does not require actual harm but punishes the scheme and therefore the defendant's *intent* to defraud. *See supra* Part I. Thus, the plain-meaning of clause (1)'s intent-to-defraud requirement is consistent with the common law: because a person only *commits* civil fraud if he causes actual harm to the victim, he only *intends* to defraud that victim if he intends to cause the victim harm. Applying any narrower civil intent requirement would be "incompatible" with the language of clause (1), which "dictates" the scope of the requisite intent. *See Neder*, 527 U.S. at 21-22, 24-25.

Finally, contrary to the government's claim, U.S. Br. 40-41, the Court's decision in *Carpenter v. United States*, 484 U.S. 19 (1987), supports Shaw's interpretation. Although the Court noted that "monetary loss" is not required by the fraud statutes, it held that a scheme to use a newspaper's confidential business information did harm the newspaper by depriving it of property, namely, its "right to exclusive use" of this information. *Id.* at 26-27 Accordingly, the defendants

who intended to cause that harm had the requisite "specific intent to defraud[.]" *Id.* at 28.

C. Because intent to defraud requires more than just intent to deceive, the jury instructions approved by the Ninth Circuit – which permitted a conviction based on intent to deceive alone – were erroneous.

The Ninth-Circuit-approved jury instructions defining "intent to defraud" and "scheme to defraud" permitted a guilty verdict based solely on intent to deceive. J.A. 18-19. Because intent to defraud means something more than just intent to deceive, these instructions were invalid. Pet. Br. 22-23.

The government insists that the instruction defining "intent to defraud" as intent to "deceive *or* cheat" was correct because "deceive" and "cheat" purportedly "reflect alternate verbal formulations for describing fraudulent conduct." U.S. Br. 46 (emphasis added). But regardless of how "deceive" and "cheat" might be defined generally or in other contexts, Shaw's proposed instructions explained that "cheat" means something different than "deceive" and that "intent to defraud" required proof of intent to do both. J.A. 22-25. The question here is whether the jury should have received *those instructions* or at least a charge other than what it got. *See Rosemond*, 134 S. Ct. at 1250, 1252 (vacating judgment and remanding even though jury-instruction

errors asserted by defendant were somewhat different than those found by Court).

The government's reading of the "deceive *or* cheat" instruction also ignores the basic grammatical principle that terms connected by the disjunctive "or" customarily have separate meanings. *See Loughrin*, 134 S. Ct. at 2390-91. A typical juror therefore would understand that the instruction "both said 'or' and meant 'or' in the usual sense," *id.* at 2391, and would naturally (and mistakenly) conclude that proof of intent to deceive alone sufficed.

The instruction defining "scheme to defraud" as "any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, *or* deprive a financial institution of something of value" suffered from the same problematic use of the disjunctive. J.A. 18 (emphasis added). As a result, it conflicts with the government's position that a scheme to defraud must be designed to deceive the bank *and* thereby wrong its property rights. U.S. Br. 17 & n.1. The government tries to salvage the instruction by arguing that the phrase "a financial institution of something of value" applies to each of the listed alternatives that precede it. U.S. Br. 45-46. But to adopt even that counterintuitive reading, the government must insert the word "out" into the text of the instruction actually given. U.S. Br. 46 (interpreting scheme-to-defraud instruction as to "'deceive' the bank out of 'something of value'" or "'cheat' the bank out of 'something of value'"). That the government must alter the text of the instruction and resort to linguistic gymnastics undermines any claim

that the jury would have interpreted the instruction this way, particularly given the separate intent-to-defraud instruction with its unqualified deceive-*or*-cheat language. To the contrary, the jury would have taken the two instructions at face value and concluded that it could convict based on intent to deceive alone, without any finding that Shaw also intended to wrong the bank's property rights (or anyone else's for that matter). That is not consistent with clause (1)'s requirement.

III. Under clause (1), intent to wrong the bank's *own* property rights means intent to obtain "bank-owned" property – that is, intent that the bank (not its customer) bear the monetary loss of a scheme to obtain customer deposits.

It is undisputed that Shaw's scheme targeted money in Stanley Hsu's Bank of America account. Pet. Br. 3-5; U.S. Br. 2-4. Where, as here, a scheme targets customer deposits, the text of clause (1) and the Court's precedent establish that the government must prove *intent* that the bank (not its customer) bear the monetary loss of the scheme. Put differently, the defendant must intend to obtain bank-owned property, not customer property.[1] The government's contrary position

[1] Contrary to the government's suggestion, Shaw has not been inconsistent about clause (1)'s intent requirement. U.S. Br. 8-9, 12, 36-37. In customer-deposit schemes, like Shaw's, intent to "cheat" the bank by "wronging" the bank's own property rights (intent to obtain "bank-owned" property) means intent that the bank bear the monetary loss of the fraud. That position aligns

improperly equates clause (1)'s intent to wrong a *bank's* property rights with clause (2)'s intent to obtain *either* bank-owned *or* bank-held property, thereby ignoring Congress's distinction between two different types of bank-fraud schemes. Construed in accordance with its plain meaning, clause (1), like clause (2), avoids banking-law technicalities, and the statute works as a whole to reach all bank-fraud conduct.

A. Clause (1)'s text and this Court's precedent require intent that the bank bear the monetary loss.

Because clause (1) textually specifies the bank as the requisite victim of the fraudulent scheme, intent to "defraud *a financial institution*" means intent to wrong the bank's *own* property rights, not its customer's. Pet. Br. 23-30. The government does not dispute that intent to wrong a customer's property rights cannot support a clause (1) conviction. Rather, it asserts that § 1344 protects the bank's *actual* "ownership" or "possessory interests" in bank-held property like customer deposits. U.S. Br. 16-23. This improperly shifts the focus from the defendant's intent – the gravamen of clause (1) – to the legal status of the property targeted by the scheme, which is not at issue. *See supra* Part I. The Court's precedent makes clear that the bank – not its customer

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with Shaw's proffered jury instructions below and his certiorari petition and reply. J.A. 21-25; Cert. Pet. 10-24; Cert. Reply 1-9. In any case, Shaw is not limited to the precise arguments made below. *See Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 378-79 (1995).

– must be the intended financial victim of the fraudulent scheme, regardless of whether the bank holds title to the funds or loses money in fact.

First, the Court's mail- and wire-fraud precedent has consistently tethered the concept of "defraud" to inflicting pecuniary or property loss on the victim. *See, e.g.*, *Pasquantino*, 544 U.S. at 355-57 (scheme to evade taxes inflicted "economic injury" on Canada because "money legally due" equivalent to "money in hand"); *Cleveland v. United States*, 531 U.S. 12, 15, 20-22 (2000) (scheme to obtain license did not defraud State because defendant not alleged to take "money to which the State was entitled by law" and license thus not "property in the hands of the victim"); *Carpenter*, 484 U.S. at 26-28 (scheme deprived newspaper of property); *McNally v. United States*, 483 U.S. 350, 356 (1987) (statute prevented frauds aimed at "fleecing the innocent people" by taking "their money or property") (internal quotation marks omitted); *Fasulo v. United States*, 272 U.S. 620, 627-28 (1926) ("defraud" means "the victim's money must be taken from him by deceit") (citing with approval *Naponiello v. United States*, 291 F. 1008, 1009 (7th Cir. 1923)); *Hammerschmidt*, 265 U.S. at 188-89 (lower court mail-fraud decision limited "to pecuniary or property injury inflicted by a scheme to use the mails for the purpose"). None of these decisions supports the view that a scheme to take customer deposits held by the bank reflects clause (1)'s requisite intent to defraud – that is, to inflict monetary loss on – the bank.

Second, the Court's precedent construing statutory language that, like clause (1), designates the requisite victim of a fraudulent scheme compels the same conclusion. Pet. Br. 25-30. These cases hold that a defendant must intend to harm the victim textually specified by such fraud statutes – not a third party. Absent the requisite intent, it is not enough that the statute's designated victim merely holds the targeted property or suffers the actual loss of the fraud.

For example, in *United States v. Cohn*, 270 U.S. 339 (1926), a statute prohibiting any scheme "for the purpose and with the intent of defrauding the Government of the United States" did not apply, *id.* at 343, where "the government acted solely as bailee[.]" *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545 (1943) (describing *Cohn*). "[D]efrauding the government" required the "fraudulent causing of *pecuniary or property loss" to the government* – not to the seller of non-dutiable cigars held at customs. *Cohn*, 270 U.S. at 343-47 (emphasis added). Because the scheme merely deceived the United States to obtain the seller's cigars, the government failed to establish the required "purpose and intent" to defraud the United States. *Id.* at 347.

Similarly, a statute penalizing conspiracies "to defraud the Government by getting a false or fraudulent claim allowed or paid" did not extend to a scheme that merely "had the effect" of obtaining government money from a private entity. *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008). Rather,

the plaintiffs were required to prove that the defendants intended to defraud the government itself. *Id.* Likewise, a statute punishing conspiracies "to defraud the United States" did not cover a scheme to defraud a government-funded-and-supervised entity absent evidence of intent to injure the United States. *Tanner v. United States*, 483 U.S. 107, 128-32 (1987) ("nature of the injury intended" and "target" of conspiracy determined statute's reach) (emphasis omitted); *see also Bridges v. United States*, 346 U.S. 209, 215, 221-22 (1953) (statute concerning the "defrauding of the United States" only applied "where fraud against the Government is an essential ingredient of the crime[,]" regardless of government's actual loss).

The same analysis applies here. Contrary to the government's claim, it is not enough that the bank holds the targeted property or suffers the actual loss of a scheme. Rather, because clause (1) textually specifies the bank as the requisite victim of the scheme to "defraud," the defendant must intend that the bank, not its customer, bear the monetary loss of a scheme to obtain deposits.[2] This may arise because the defendant believes that the bank owns the deposits targeted by the scheme or that the bank will reimburse its customer for these funds; in either case, the defendant intends that the bank pay out its *own* money and suffer

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[2] The authority the government relies on from outside the fraud context, U.S. Br. 21-23, merely stands for the proposition that legally-recognized possessory rights in property may give rise to certain claims. Here, regardless of whether the bank actually has rights in the deposits targeted, clause (1) liability rests on the defendant's intent.

the loss. Conversely, if a defendant intends that the customer bear the loss of the fraud, then he does not intend to wrong the bank's property rights in those funds.

Here, the government had to prove that Shaw intended BofA, not Hsu, to bear the monetary loss of the scheme. Because the Ninth Circuit approved jury instructions that relieved the government of that burden, they were erroneous. *See supra* Part II.C.

B. The structure of § 1344 and the common understanding of deposits as customer property support the plain-meaning interpretation of clause (1).

Section 1344's structure also rebuts the government's view that a customer-deposit scheme reflects the requisite intent to defraud a bank because, it claims, there is no meaningful distinction between bank-held customer deposits and bank-owned property. Clause (1) and clause (2) punish different, though overlapping, crimes. While clause (1) requires intent to wrong a bank's own property rights, clause (2) requires intent to obtain *either* bank-owned *or* bank-held property. *Loughrin*, 134 S. Ct. at 2388-89. In this way, clause (2) distinguishes between (and covers) two distinct types of schemes. Pet. Br. 30-33.

That drafting decision is consistent with the common understanding of deposits as customer property held by the bank – not owned by the bank. Congress defines a "deposit" as money "received or held" by a

bank "for which it has given or is obligated to give credit[.]" 12 U.S.C. § 1813(l)(1). This Court, too, has described deposits as property "held" by the bank, and a customer as "owner" of the deposits. *See, e.g., Anderson National Bank v. Luckett*, 321 U.S. 233, 236-38, 245, 249-52 (1944). The Court has also recognized that, even though a bank takes title to deposits, a "depositor does not think of himself as lending money to the bank." *Texas & Pacific Ry. Co. v. Pottorff*, 291 U.S. 245, 259 (1934). Rather, "from the point of view of most depositors[,]" "[s]afe-keeping" is the "chief" function of "deposit banking[.]" *Id.* The public thus "entrust[s]" its "assets and hard earnings" to banks. *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 432-35 (1986) (FDIC created to "safeguard" customers' assets "against the possibility that bank failures would deprive them of their savings"). This common understanding of deposits as customer property is also reflected in the language we use when talking about the funds in our bank accounts. We "deposit" and "withdraw" our money; we do not "loan" it to the bank.[3]

Contrary to the government's claim, there is thus a critical distinction between bank-held customer deposits and bank-owned property in the eyes of Congress, the Court, and the public. Accordingly, intent to obtain customer deposits is not intent to obtain bank-owned property. Consistent with this view, this Court

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[3] The facts of this case – where Hsu, not BofA, suffered loss – also comport with the common understanding of customer deposits. Indeed, Hsu testified that *his* property was taken – not the bank's. R. 340-42.

has characterized a scheme to obtain customer deposits as one that intends to obtain bank-held, as opposed to bank-owned, property within the meaning of clause (2). *Loughrin*, 134 S. Ct. at 2392.

The government's contention that bank-owned and bank-held property overlap *in fact* because a bank may both own and hold the same property misses the point. U.S. Br. 24. Congress's use of the disjunctive – schemes to obtain property "owned by, *or* in the custody and control of" a bank – plainly distinguished between schemes designed to target bank-owned and bank-held property. Although the property categories may actually overlap, it does not follow that *intent* to take bank-owned property is the same as *intent* to take bank-held property. Clause (2) makes clear they are not.

In this case, for example, it may be that BofA both owned and held Hsu's customer deposits. As Shaw has acknowledged, clause (2) easily covers his scheme because it was designed to obtain deposits from the custody of the bank. Pet. Br. 45-46. By proceeding under clause (1), however, the government assumed a more difficult burden to prove that Shaw intended to obtain bank-owned funds, given the general understanding of deposits as the customer's bank-held funds.

Where a scheme is designed unambiguously to target the bank's own property – such as check kiting, loan fraud, and bank embezzlement – proving intent to take bank-owned property is straightforward. Pet. Br. 42-44. The government asserts that these schemes are akin to customer-deposit schemes because they target

what is *in fact* the same pot of funds. U.S. Br. 11, 35. To the contrary, because the gravamen of § 1344 is intent, the key difference is that the paradigmatic clause (1) schemes lack any potential intended non-bank victim. That the bank is the *only* possible intended victim in check-kiting, loan-fraud, and bank-embezzlement schemes makes proof of clause (1)'s intent-to-defraud-a-bank element straightforward. Clause (2) remains the appropriate charge for customer-deposit and altered-check schemes that involve a non-bank victim, provided the requisite means of a false statement. Pet. Br. 42-44.

The express distinction in clause (2) between two types of schemes and the general understanding of deposits as bank-held customer property confirm that clause (1)'s intent to "defraud *a financial institution*" should be interpreted in accordance with its plain meaning to require intent to obtain bank-owned (not bank-held) property. The government contends that § 1344's legislative history is inconsistent with this interpretation of clause (1) because Congress intended § 1344, *as a whole*, to "reach a wide range of fraudulent activity" and thereby "protect the financial integrity of financial institutions[.]" U.S. Br. 13, 26-27 (internal quotation marks omitted). Of course, only the "most extraordinary" showing of contrary congressional intent could justify rejecting clause (1)'s plain meaning, and the government agrees that Congress did not discuss the scope of clause (1). *See Salinas v. United States*, 522 U.S. 52, 57 (1997) (internal quotation marks omitted); U.S. Br. 26. To the extent that the legislative history is

relevant, however, it supports Shaw's interpretation of clause (1) – which, together with clause (2), makes § 1344, *as a whole*, fully serve the articulated purpose.[4] Pet. Br. 34-47.

Indeed, the presence of both clauses reflects "belt-and-suspenders caution[.]" *See Yates v. United States*, 135 S. Ct. 1074, 1096 (2015) (Kagan, J., dissenting). Although the overlap between the two clauses is "substantial[,]" *Loughrin*, 134 S. Ct. at 2390 n.4, often one clause will best fit a particular scheme, as clause (2) did here.

C. Clause (1), like clause (2), avoids banking-law technicalities given that intent is its "whole sum and substance."

The government complains that Shaw's construction of clause (1) will entangle courts in technical issues of banking law, making customer-deposit schemes

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[4] The government also claims that Congress's rejection of economic-loss language undermines the plain-meaning interpretation of clause (1). U.S. Br. 41. Using language that Congress did not enact to override clear language that it did enact is inappropriate, particularly given that the drafting history suggests that the scheme-to-defraud text was chosen because Congress heeded the Justice Department's position that there was no "reason to abandon" the "settled" term "scheme to defraud," which had been interpreted by "countless court decisions[.]" *Financial Bribery and Fraud: Hearing Before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 4-5, 12 (1984) (testimony and statement of Victoria Toensing, Deputy Assistant Attorney General, Criminal Division). If anything, this history thus supports Shaw's construction of clause (1) based on this Court's precedent. Pet. Br. 15-22.

"off limits" to prosecution. U.S. Br. 27-29, 42-44. This ignores clause (2), the appropriate charge where a scheme involves an intended non-bank victim, provided the requisite means. *See supra* Part III.B; Pet. Br. 44-46.

Although the government may still proceed under clause (1), it then invites a more difficult evidentiary burden, given the general understanding of deposits as customer property. If it elects this path, the government's best tools for meeting clause (1)'s requirement will be direct evidence of a particular defendant's intent that the bank (not its customer) bear the loss, such as statements by the defendant or co-conspirators in the course of the scheme or post-arrest. It will rarely, however, have good reason to delve into banking law. As the government itself acknowledges, the banking-law technicalities that govern the legal status of customer deposits and the apportionment of loss are unknown by "many citizens" and "even quite a few lawyers[.]" U.S. Br. 31, 43. They also fail to yield clear, predictable answers. U.S. Br. 27-29 & nn.5-7 Except perhaps in the rare case of a bank insider, these technicalities are not probative circumstantial evidence of a defendant's *intent* that the bank, rather than its customer, bear the loss of a fraud. *See United States v. Nkansah*, 699 F.3d 743, 750-51 (2d Cir. 2012) (no reasonable inference of requisite intent where "evidence of the state of mind is absent" and bank's exposure to loss not "sufficiently well-known" or "unclear, remote, or non-existent").

Still, if the government wants to present such evidence, it is well-equipped to do so. In this case, for example, after electing to proceed under clause (1), notwithstanding clause (2), it elicited testimony from a bank employee about the rules governing allocation of loss. R. 428-29. The government's summary of the loss-allocation rules here, U.S. Br. 27-29 & nn.5-6, illustrates that it could also present such information in the form of a jury instruction in an appropriate case. Indeed, courts, lawyers, and juries frequently deal with complex technical evidence and instructions.

In the end, the government does not dispute that any bank-fraud conduct will be provable under Shaw's plain-meaning interpretation of clause (1), or clause (2), or both – provided the government makes proper charging decisions. Pet. Br. 41-47; U.S. Br. 32. It also never disputes that clause (2) was the appropriate charge here, or that, so charged, its evidentiary burden would have been straightforward. Pet. Br. 45-46. Instead, having chosen the more difficult path of clause (1), the government asks the Court to reject the statute's plain meaning and lessen the burden it thereby took on. That is neither necessary nor appropriate.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals and remand the case for proceedings consistent with its opinion.

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No. 15-5991

In The
Supreme Court of the United States

LAWRENCE EUGENE SHAW,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER AND URGING REVERSAL

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QUESTION PRESENTED

Whether, for purposes of clause (1) of the bank-fraud statute, 18 U.S.C. § 1344, knowingly executing a scheme "to defraud a financial institution" requires proof of an intent to deceive and cheat a bank--in other words, that the defendant's objective in devising the scheme was to obtain bank-owned property by deceiving the victim bank.

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. Its approximately 9,200 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous amicus briefs each year in the Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL works to resist overcriminalization—the steady expansion of federal crimes, through new criminal statutes and broad interpretations of

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[1] Under S.Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Amicus has lodged with the Court letters of consent to the filing of this brief from all parties.

existing statutes by the executive and judicial branches.[2] This case presents another example of that trend. NACDL's views will assist the Court in placing the narrow question presented in this case within the broader context of government efforts to stretch federal criminal statutes beyond their plain language.

SUMMARY OF THE ARGUMENT

The statement of facts in petitioner's brief leaves little doubt that he behaved badly toward his victim, Stanley Hsu. As this Court observed long ago, however, "under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process." *Parr v. United States*, 363 U.S. 370, 394 (1960) (reversing mail fraud conviction where mailing did not fall within the scope of the statute). The Court unanimously reaffirmed this principle only days ago. In a case it found "distasteful" and "tawdry," the Court nonetheless resisted "the broader legal implications of the Government's boundless interpretation of the federal bribery statute" and rejected the government's argument that performing ordinary political favors constitutes a federal criminal offense. *McDonnell v. United States*, 2016 U.S. LEXIS 4062, at *51 (June 27, 2016).

This case warrants similar treatment. The government charged petitioner's taking of Hsu's money under 18 U.S.C. § 1344(1), a statute that

[2] For a description of NACDL's efforts to reduce overcriminalization, see https://www.nacdl.org/overcrim/.

prohibits fraud directed against a financial institution, not the institution's customers such as Hsu. The court of appeals sought to preserve the conviction by stretching § 1344(1) beyond its plain terms.

The Court should reverse the court of appeals' decision and reinforce the principle that, no matter how culpable the defendant's behavior, a conviction may only be obtained under a statute that clearly encompasses the conduct at issue. In addition to the rules of statutory interpretation urged in petitioner's brief, the Court should interpret § 1344(1) in light of the principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). To the extent ambiguity remains after the Court has interpreted the statute, "the tie must go to the defendant" under the rule of lenity. *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion); *see, e.g., Skilling v. United States*, 561 U.S. 358, 410-11 (2010).

ARGUMENT

1. In case after case in recent years, this Court has turned to settled principles of interpretation to cabin prosecutors' efforts to expand federal criminal statutes beyond the limits of their language. In *Cleveland v. United States*, 531 U.S. 12 (2000), for example, the Court rejected prosecutors' efforts to extend the "property" element of the mail fraud statute to licenses held by the state. *Id.* at 26-27. In *Skilling*, the Court limited the honest services

fraud statute to its core meaning of bribes and kickbacks. *See* 561 U.S. at 410-11. In *Sekhar v. United States*, 133 S. Ct. 2720 (2013), the Court held that "property" in the Hobbs Act did not include a state employee's prospective recommendation. *Id.* at 2727. In *Yates v. United States*, 135 S. Ct. 1074 (2015), the Court rejected the government's view that an undersized fish was a "tangible object" in a statute aimed at document destruction. *See id.* at 1088-89 (plurality opinion). And most recently, in *McDonnell*, the Court rejected the government's "boundless interpretation" of the "official act" element of the federal bribery statute.

These cases apply a number of interpretive principles. Some principles, such as *noscitur a sociis*,[3] apply in all cases, civil and criminal. Others, such as the rule that statutes must be interpreted narrowly to ensure fair notice,[4] apply primarily in criminal cases. But the Court's application of these principles in cases interpreting federal criminal statutes underscores a fundamental point: that criminal provisions may not be expanded beyond their terms, no matter how culpable the conduct at issue.

2. Two principles that recur in these cases are of particular interest to NACDL. First, the Court has repeatedly recognized that use of broadly worded federal crimes to prosecute matters traditionally regulated by the states raises federalism concerns. *See, e.g., McDonnell*, 2016 U.S. 4062, at *45

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[3] *See, e.g., Yates*, 135 S. Ct. at 1085 (plurality opinion); *id.* at 1089 (Alito, J., concurring in judgment).

[4] *See, e.g., McDonnell*, 2016 U.S. LEXIS 4602, at *44.

(government's interpretation of the federal bribery statute "raises significant federalism concerns"); *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014) (declining to read 18 U.S.C. § 229 broadly to "alter sensitive federal-state relationships") (quotation omitted); *Cleveland*, 531 U.S. at 24 (declining to extend the mail fraud statute to "a wide range of conduct traditionally regulated by state and local authorities"); *Jones v. United States*, 529 U.S. 848, 858 (2000) (same; interpreting federal arson statute); *Williams v. United States*, 458 U.S. 279, 290 (1982) (construing statute narrowly in part because the case involved "a subject matter that traditionally has been regulated by state law"); *Rewis v. United States*, 401 U.S. 808, 812 (1971) (construing 18 U.S.C. § 1952 and rejecting a broad interpretation where it "would alter sensitive federal-state relationships").

Shifting the prosecution of crimes from state to federal court has several potential adverse consequences. For example, federal prosecution of offenses punishable under state law diminishes the stature of state courts by suggesting they lack the competence to address such cases. Such prosecutions tend to centralize police power in the federal government, contrary to the constitutional model of distributed federal and state powers designed to "reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Federal prosecution of offenses prosecutable under state law also risks disparate results for the same conduct, places an increased burden on federal courts, and diminishes the distinct role of federal courts as stewards of distinctly federal interests. *See, e.g.*, American Bar Association Task Force on the

Federalization of Criminal Law, *The Federalization of Criminal Law* at 26-39 (1998).

To address these federalism concerns, the Court has held that, absent a clear statement of congressional intent, the federal government may not intrude into areas of criminal law enforcement traditionally left to the states. *See, e.g., Bond*, 134 S. Ct. at 2088 ("The problem with this interpretation is that it would dramatically intrude upon traditional state criminal jurisdiction, and we avoid reading statutes to have such reach in the absence of a clear indication that they do.") (quotation and brackets omitted); *Cleveland*, 531 U.S. at 25 ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." (quotation omitted)); *Jones*, 529 U.S. at 858 (same); *Bass*, 404 U.S. at 349 ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."). This "clear statement" rule performs a crucial function in cabining the scope of broadly worded federal crimes.

Second, under the rule of lenity, "when there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *see, e.g., Yates*, 135 S. Ct. at 1088 (2015) (same) (plurality opinion); *Skilling*, 561 U.S. at 410-11 (applying rule of lenity to honest services statute); *Scheidler v. NOW*, 537 U.S. 393, 409 (2003) (applying rule of lenity to Hobbs Act). The rule requires that

> the tie must go to the defendant. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

Santos, 553 U.S. at 514 (plurality opinion).

These principles strongly support petitioner's interpretation of § 1344(1). As petitioner demonstrates in his brief, the plain language and structure of § 1344(1) show that Congress intended the statute to apply only when the defendant intends to wrong a financial institution in its property rights through deceit. The legislative history buttresses that interpretation. Principles of federalism and the rule of lenity confirm that petitioner's interpretation is correct.

3. To the extent § 1344 addresses frauds that target the property of federally insured banks and other financial institutions, the federal government has an obvious interest in prosecuting. But to the extent the statute addresses frauds against bank *customers* such as Hsu, the offense falls within an area of traditional state regulation. For example, California--where petitioner's conduct occurred--has a series of statutes under which he could have been

prosecuted in state court for his criminal actions toward Hsu. *See, e.g.*, Cal. Penal Code §§ 484(a) (theft), 528.5 (impersonation through electronic means), 530 (receiving money or property as a result of false personation), 530.5 (unauthorized use of personal identifying information). There is nothing to suggest that state authorities lack the means or the will to prosecute offenses under these statutes.[5]

Because extending § 1344(1) to schemes that target bank customers would sweep in "a wide range of conduct traditionally regulated by state and local authorities," *Cleveland*, 531 U.S. at 24, the Court should adopt that interpretation only if Congress has clearly stated its intent to protect bank customers, as well as banks. Congress provided such a clear statement in § 1344(2); that provision extends not only to property "owned by" a bank, but also to property "under the control of" a bank, which includes the property of bank customers such as Hsu. But far from including a clear statement of intent to protect customers in § 1344(1), Congress did the opposite; it specified that the target of the fraud had to be a "financial institution." To avoid "significant federalism concerns," *McDonnell*, 2016 U.S. 4062, at *45, the Court should limit § 1344(1) to schemes intended to wrong a financial institution in its property rights.[6]

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[5] Here, as in *Parr*, "the showing, however convincing, that state crimes of misappropriation, conversion, embezzlement, and theft were committed does not establish the federal crime" of scheming to defraud a financial institution. *Parr*, 360 U.S. at 393-94.

[6] In *Loughrin v. United States*, 134 S. Ct. 2384 (2014), the Court rejected a federalism argument that, in the Court's words,

4. To the extent the "clear statement" rule and other tools of statutory interpretation leave doubt about the scope of § 1344(1), the rule of lenity requires that the ambiguity be "'resolved in favor of lenity.'" *Yates*, 135 S. Ct. at 1088 (quoting *Cleveland*, 531 U.S. at 25). That rule serves as a critical safeguard against the temptation--evident here--to distort the language of a federal criminal provision to encompass blameworthy conduct that does not fall clearly within the statutory text.

CONCLUSION

The judgment of the court of appeals should be reversed.

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sought to add "an invisible element" (intent to defraud a bank) to § 1344(2). *Id.* at 2393. Here, by contrast to *Loughrin*, the government--not the defense--seeks to expand the plain language of § 1344(1), and it does so without a clear statement that Congress intended the broad reading it urges.

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